Supreme Court, U.S.
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No 05-900

In The
SUPREME COURT OF THE
UNITED STATES

RICHARD LEE BEAMS-- PETITIONER

vs

GALE NORTON, Secretary --RESPONDENT
of Department of Interior

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Will the U.S. Government honor it's trust responsibility to the Native American people?

Will the U. S. Government honor the Wheeler Howard Act also known as the Indian Reorgainzation Act in its Indian Preference regulations in employing Indian People in the Bureau of Indian Affairs?

Does the U. S. Government endorse the illegal cultivation of marijuana on Indian Trust lands on Indian Reservations?

Does the U. S. Government endorse cussing of employees by supervisors as part of official business?

JURISDICTION

For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was September 1, 2005.

No petition for rehearing was timely filed in my case.

The Jurisdiction of this Court is involked under 28 U. S. C. 1254

PARTIES TO THE PROCEEDINGS BELOW

Other employees of the Department of the Interior and legal represenatives as follows:

Linda Saunders in her individual and official capacity as former the Superintendent of the Horton Agency.

Jeannie Cooper in her individual and official capacity as an employee of the Anadarko Area Personnel Office.

Evelyn Gomez in her individual and official capacity as the BIA Anadarko Area Personnel Officer (deceased) and her successor, Jeanie Cooper.

Jackie Rapstine, in her individual and official capacity as Assistant U. S. Attorney. Kansas representing Bureau of Indian Affairs personnel in the District Court legal proceedings.

Martin Steinmetz in his individual and official capacity as Attorney for the Tulsa, Solicitors office representing the BIA in the Equal Employment Opportunity Commission legal procedings.

STATUTORY PROVISIONS INVOLVED

Cases

Morton v. Mancuri

Authorities and Statutes;

Indian Reorganization Act of 1934 aka Wheeler-Howard Act, 25 U. S. C 1461 and Indian Preference Act, 25 U.S.C. 472 et seq

Title VII Civil Rights Act of 1964

Age Discrimination in employment, Act 29 U.S.C. 621

Office of Personnel Management Suitability Investigation for the Horton Agency Soil Conservationist position.

5C.F.R. part 731,501

5C.F.R. 731.103(a)(1944)

5 C.F.R. 731.202

5 C.F.R.731.103(d)(1994)

5 C.F.R.731.501

5 C.F.R.731.508 (1992)OPM Qualification Standards X118, Federal Personnel Manual-(FPM) 338, and FPM 731-3

5 C.F.R. 731.104 (g) (2004)

5 U.S.C. 2302(b)

5 U.S.C. 731 .303(e)(1994)

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PETITION FOR A WRIT OF CERTIOTI

Petitioner Richard L. Beams respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the 10th Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a-2a) has been filed in the United States Court of Appeals, tenth Circuit, September 1, 2005. The district court's order granting the defendant dismissal of Plaintiff's claims filed in Kansas District Court (3a-14a copy is enclosed).

Merit Systems Protection Board decision (Pet. App. 15a-26a) copy enclosed.

Office of Personnel Management Decision (Pet. App. 27a-28a) enclosed.

Chief of the Bureau of Indian Affairs Management opinion (Pet. App. 29a-30a) enclosed

The State of Kansas Department of Human resources Referee and Review Board Decision (Pet App. 31a-34a) enclosed

Jurisdiction

The judgment of the court of appeals was entered on September 1, 2005. The court has jurisdiction pursuant to 28 U.S.C. 1254.

RELEVANT CONSTITIONAL PROVISION

The Fourteenth Amendment to the Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property without due process of law"

STATEMENT OF THE CASE

This case is a consolidation of four Equal Employment Opportunity Cases Petitioner, Richard L. Beams, filed during the past 14.5 years concerning employment at the Horton Agency, Horton Kansas.

BIA-91-031--Sexual Discrimination - Soil Conservationist at Horton Agency, Horton Ks.

BIA-94-067 Reprisal Soil Conservationist Position at Horton Agency.(This case was manipulated out of the other cases by the defendant and is not included in this Petition but is referenced because the next two cases are the direct results of the discrimination of this case.

BIA-94-052--Reprisal and Age--Office of personnel Management (OPM) Investigation case.

BIA-95-027--Reprisal, Race and Age-- Soil Conservationist position at Horton Agency, Horton Kansas.

BIA-99-045--Reprisal--Superintendent Position at Horton Agency, Horton Kansas.

The first case, #**BIA-031-91** was a Sex discrimination case due to the neglect of the Trust responsibility of the Superintendent and Acting Realty Specialist in getting their work done to lease the Trust land in the Horton Agency.

This was the first EEO complaint that I filed at the request of Evelyn Gomez, Personnel Officer, at the Anadarko Area Bureau of Indian Affairs office. This request was made after I had resigned due to the sexual discrimination and harassment that I had been subjected to during the past year while working as a Soil Conservationist at the Horton Agency Bureau of Indian Affairs in Horton Kansas.

We were always working with a shortage of staff and it was necessary that all available staff in Natural Resources programs work closely together to get the basic work accomplished to keep the trust lands leased. During 1990 both the Superintendent and Realty Specialist positions were vacated and new staff was hired that was not

knowledgeable of the on going work load. They not only lacked the knowledge to supervise and operate the programs, they refused to allow the existing staff do the work needed to accomplish the required work to keep the work flowing to get the leases completed.

The most essential work that was not completed was the 90 day notice to the Indian landowners. This notice was required prior to advertisement of the lands for lease and should have been sent out one year prior to the land being advertised. The Realty personnel failed to get this notice out and therefore could not legally advertise the lands that were eligible to lease. During this time I was being accused of not getting my work done but in realty, my work depended on getting the leases advertised and a lessee identified so I could work with him as required to complete the soil conservation farm stipulations for that specific lease.

Another incident involved in the harassment was the previous month when I had reported an area on a Potawatomi Reservation allotment to the County Sheriff that had been farmed to marijuana and harvested as part of the crop that was being grown. The farmer was convicted as a drug dealer and sent to prison but the Superintendent never canceled the lease even after he was sent to prison. I was accused improper and incorrect conduct because I told the County Sheriff that the Superintendent had the authority to cancel the lease if the lessee was using the property illegally or allowing it to be used illegally. This provision is part of the federal lease issued to the farmer to farm the land. I was under verbal orders from the Superintendent to report all marijuana.

During a discussion about how to accomplish the needed work the Acting Realty Specialist, Brenda Shadwick, began cussing me and it was apparent that nothing was going to be accomplished so I politely left the room and requested a witness to the meeting prior to completing the meeting.

The Superintendent refused to allow me to have a witness and therefore I refused to return to the meeting. I was accused of being insubornate because I refused to participate in an official proceeding (sit and take a cussing without a witness).

The Superintendent, Linda Saunders, requested the Area Director to Terminate me during the next month. Due to a past work record, I was not terminated as there were no history of any kind of any past problems with my work prior to the employment of Linda Saunders as the Agency Superintendent. I had a good work history and record. After the termination effort did not work, the paper trail was started to build a case against me by terminating me for two weeks without pay. The only recourse I had was to go talk to the Area Director and essentially beg him to override the Superintendent. At that time there was discussions among some of the BIA staff that the superintendent and Area Director was having an affair and if this was true I certainly not expect any help from him. The last tim.. that there were rumors of a previous Superintendent and one of the Secretaries in the Agency, the Secretary had an illegitimate baby. I had no desire to get involved in this kind of situation so in an effort to protect my work record, I resigned due to the sexual discrimination and harassment. Brenda Shadwick, the Acting Realty specialist was not penalized for not getting the 90 day notices out so the work could be done as legally required.

I initially planned to seek employment in other agencies to complete my career as I had 24+ years of satisfactory Federal Civil Service creditable work. I had no intentions of filing an EEO complaint because I had no confidence that anything would be done from my observation of another employee's experience that used to work at the Horton Agency.When I talked to the Personnel Officer, Ms Evelyn Gomez to obtain my retirement funds so I would have a source of funds to live on while I was seeking

another job she requested that I file an Equal Employment Opportunity Complaint to help get the problems that resulted in my resignation solved.

I also talked to the Area Director to let him know about the work that needed immediate attention. He brought up the rumor of his affairs between him and the Superintendent. I had no interest in discussing this with him but he brought it up and denied the rumor.

After talking to the Area Director and the Personnel Officer I thought there may be a chance that the situation could be corrected so I filed an EEO Complaint as requested. The EEO Counselor negotiated a settlement for me to go back to work but the Superintendent backed out on her agreement and refused to honor the settlement for me to return to work.

After the failed settlement effort, I filed a formal EEOC complaint and instead of hiring an unbiased investigator as required, the BIA hired a retired BIA Area Director to investigate the complaint. He did not record all of our discussion during his investigation and did not investigate or report the problems that caused my resignation. He basically wrote his investigation up to cover up the problems.

I requested assistance from Senator Dole and Senator Kasselbaum from Kansas to prohibit the previous investigator from being selected to investigate future complaints that I filed in response to the reprisal by the BIA in not selecting me for other jobs that I had applied for and was the best qualified applicant. I was assured by them that he would not be selected but the BIA continued to select his company for two other complaints. He did not talk to me during the investigations but his daughter did and she signed the investigation report.

Federal and State Conflicting Decisions

Conflicting decisions of the Kansas Department of Human Resources (see appendix page #31a-34a)and the Merit

Systems Protection Board concerning Harrassment by the Employer (BIA) was my next disappointment of possible settlement the discrimination of this case The Human Resources Department determined that I was harassed to the point that I was justified in my resignation. Judge Joseph Hartman of the MSPB decided was that I was not coerced into resigning and cla..ned .he did not have jurisdiction. He did not consider the sexual discrimination complaint.

The BIA readvertised the Soil Conservationist position in the BIA vacancy announcement system, received an application from a qualified Indian applicant but did not hire him. The BIA then readvertised this position in the Office of Personnel vacancy announcement system and I applied for it and was the best qualified applicant by 5 points without Indian Preference (see Patrick Hamilton Memo Appendix #29a-30a). With Indian Preference, I was the only qualified applicant as determined by Mr. Hamilton, Chief of BIA Personnel Management but Jeanie Cooper, an employee in the Anadarko Area Personnel prepared a Standard Form #62 (an objection to my name being on the Certificate) and fraudulently signed here name as the Area Personnel Officer. The OPM removed my name from the certificate without any effort to allow me to refute the action. I was placed under investigation (by OPM) to see if I was suitable for the Soill Conservationist position at the Horton Agency and was determined suitable. (see Appendix page #27a-28a) but was not returned to the certificate of eligibiles as the BIA went ahead and filled the position. Neither the BIA or OPM did anything to remedy the problem so I filed EEO complaint # BIA-94-052.

CONFLICT IN FEDERAL COURT DECISIONS

Suitability for the Soil Conservationist position at the Bureau of Indian Affairs (BIA) Horton Agency, Indian Preference in hiring within the Bureau of Indian Affairs positions.

This should have not have been a question at all because the Office of Personnel Management Branch of Suitability and the Chief of the BIA Personnel Management had already
investigated Richard L. Beams and determined him suitable for this position. With Indian Preference, he was the only Qualified applicant for the two times this position was advertised in the OPM and BIA vacancy announcements.

Ms Gomez, Area Personnel Officer in concurrence with Jeanie Cooper, another personnel employee, made a negative decision of unsuitability against the Richard L. Beams, without any delegated authority. (see MSPB decision Appendix pages #15a-26a)

The District Court Judge, Julie Robinson, tried to defer the question of the Suitability of Richard L. Beams, Petitioner, for the Soil Conservationist position at the BIA Horton Agency to the Merit Systems Protection Board.

The MSPB claims that they do not have the jurisdiction but in their decision they also stated that Evelyn Gomez had no authority to make the decision that she made that I was not suitable for employment as the Soil Conservationist.

The above federal Court decisions in item #1 relate to all four cases and specifically to the EEO Case #BIA-95-027

The federal courts that conflict in their decisions are the Kansas District Court in Topeka Kansas and the affirmation of their decision by the 10th Circuit Court of Appeals located in Denver Colorado and the Merit Systems Protection Board (MSPB) Western Regional Office located in San Francisco California.

The MSPB was involved due to another decision by the Kansas District Court in reference to the Indian Preference Act that required the MSPB to make the final decision regarding petitioners suitability for federal employment and the Soil Conservationist position that he applied for, was qualified but was denied register on the Certificate of eligible applicants and therefore employment in EEO case #

BIA-95-027.

MSPB Administrative Judge, Carol J. Teather, in the initial decision dated March 17, 2005 on MSPB case docket # SF-3443-05-0147-I-1 (see appendix #1) page 6 states"Ms. Gomez claimed to have rendered a negative suitability determination under 5 C.F. R. Part 731 in connection with appellant's application for the Soil Conservationist position under Vacancy Announcement No. AN-94-036. ARF tabs 4p, 4q. According to Ms. Gomez, she made the negative suitability determination under authority of the OPM suitability determination letter dated December 16, 1993, Qualification Standards X118, Federal Personnel Manual (FPM) 338, and FPM 731-3. ARF tab 4p. I find, however, the record lacks support for Ms. Gomez's position regarding her authority to make suitability determinations under 5 C. F. R. Part 731."

"There us no evidence showing that the Qualifications Standards X118 or the Federal Personnel Manual contain a delegation of authority by OPM to an agency Area Personnel Officer to make suitability decisions under 5 C.F.R. Part 731. By regulation in effect at the time, OPM delegated to the "head of each agency" authority for adjudicating suitability under 5 C.F.R. Part 731 of applicants filing directly with the agency outside a civil service register. C.F.R. 731.103(a) (1994). Any applicant or appointee who is found unsuitable by any agency having delegated authority from OPM under 5 C.F.R. Part 731 for any reason named in 5 C.F.R. 731.202 may appeal the adverse suitability decision to the Merit Systems Protection Board. 5 C.F.R. 731.103(d) (1994)."

In the instant case, there is no evidence showing that either the head of the agency or OPM delegated authority to make suitability determinations to the Anadarko Area Personnel Officer of the BIA. There is also no evidence showing that such a delegation is contained in an agency rule, regulation or policy. To the contrary, the Chief,

Division of Personnel Management, DOI, BIA, Patrick Hamilton, indicated that Ms. Gomez did not have such delegated authority. In a memorandum dated October 26, 1994, Mr. Hamilton stated that the OPM Branch of Suitability Adjudication must make the final determination on whether a current or perspective employee is suitable for employment, and the BIA"Servicing Personnel Office" should place appellant's name on the Certificate of Eligibles for the Position of Soil Conservationist, GS-457-11, at the Horton Agency. IAF tab 8, sub tab 9; ARF tab 4r"

"Also, contrary to the position taken by Ms. Gomez, the December 16, 1993 suitability decision issued to appellant by OPM does not contain a delegation of authority to the agency to make suitability decisions under 5 C.F.R. Part 731. The language in the decision stating that "[a]gencies are also responsible for adjudicating the suitability of applicants" does not constitute a delegation of authority.

Rather, it is simply intended to inform appellant that agencies also have a say in deciding who they hire for a position, and that although his eligibility will provide him with full consideration for any position for which he is qualified, it is not a guarantee that he will be appointed to the position. *See* OPM suitability decision, ARF tab 4b.

Patrick J Hamilton, BIA Chief Division of Personnel Management also stated in his memo "Mr. Beams' Certificate of Indian Blood made him the only eligible candidate which prompted the BIA Servicing Personnel Office for Horton to submit a Standard form 62 to OPM objecting to Mr. Beams name being placed on the Certificate. The OPM Wichita Area Office sustained the objection in their initial decision but also sent the negative information regarding Mr. Beams to OPM's Branch of Suitability Adjudication. On December 16, 1993, they determined Mr. Beams to be suitable for Federal Employment".

AJ Teather referenced the District Court Decision case

No 03-4027-JAR (Dist. Ct. District of Kansas, July 30, 2004), IAF tab 1. This case was footnoted in the 10th Circuit Court Appeal decision by Circuit Judge Michael R. Murphy stating "We decline to adopt that portion of the district court's July 30, 2004 decision that examines Beams' IPA claim under Federal Rule of Civil Procedure12 (b) (6) and finds failure to plead a claim for non-monetary relief under the Administrative Procedure Act. *See steel Co. v Citizens for a better Env't,* 523 U.S. 83, 94, 101-02 (1998).

The Federal Judge, Joseph Hartman, in the Merit Systems Protection Board (MSPB) federal court issued an opposing decision and said he didn't have jurisdiction. The MSPB decision was that I was not coerced into resigning and therefore did not consider the Sexual Discrimination that was the reason for my resignation. The harassment was part of the sexual discrimination issue.

Petitioner attempted to get this case docketed in the Supreme Court but did not have sufficient information in the initial petition. Due to lack of funding and legal knowledge he was not able to respond at that time hoping that he could regain employment and hire an attorney to proceed with the case. After 7 years, the Supreme Court Clerk decided that the application was 1 day late and rejected the application.

Petitioners Case Summary-- BIA-91-031---This is a harassment and sex discrimination case. The basic problem was that the Bureau of Indian Affairs branch of Realty was not getting their work done due to a change personnel in the Realty Specialist and Superintendent positions. These positions were filled with inexperienced personnel and they were not doing the work that they were required to do in order to lease the Indian Trust lands at the Horton Agency, Horton Kansas.

Specifically, they were required to inform the Indian landowners one year prior to the expiration of the current lease that they had a 90 day negotiation period to

negotiate a lease with a lessee. If no lease was negotiated then the Superintendent had the responsibility to advertise the land for lease. The 90 day notices were not sent out as required by the branch of Realty so the Superintendent could not legally advertise the lands until this job was completed. My work schedule was changed by requiring me to try to write Soil Conservation lease stipulations prior to securing a lessee instead of meeting with the successful bidder after the lease bids were open and a lessee had been selected to lease the land. In summary, they tried to blame me for their mistakes. The Acting Realty Specialist was responsible for the 90 day notices.

I was doing the work required until the Superintendent served me with an order of two weeks of suspension without pay and then I resigned. This action followed a month of effort on the behalf of the Superintendent to unsuccessfully terminate my employment. The termination effort was basically because she refused allow me to have a witness during a meeting with her and the Acting Realty Specialist when the Acting Realty Specialist decided to start cussing me. I left the meeting and refused to return without a witness. I was refused a witness to witness the cussing and harassment. I was served a notice of a 2 week suspension without pay and the Acting Realty Specialist was not disciplined in any way. I resigned due to the sexual discrimination and to prevent further degradation of my work record.

Evelyn Gomez, BIA Personnel Officer, requested me to file an EEO complaint to help correct the problems that caused my resignation. I filed the complaint as requested and the EEO counselor negotiated a settlement for me to return to work. I documented my understanding of the settlement in writing as required in the EEO regulations but the BIA backed out on the settlement.

After the informal complaint efforts failed, I filed a formal EEO complaint in 1991 and called the Defendants Attorney, Martin Steinmetz of the Solicitors Office in Tulsa Oklahoma to continue to make efforts of settlement. Mr. Steinmetz told me that he would not allow me to return to Horton Kansas even if I received a favorable ruling from the EEO process. I later was told by the Merit Protection System Protection Judge Hartman that this was not true as the only place he could place me if he ruled in my favor was at the Horton Agency, Horton Kansas. In 1999 after several years and several complaints later due to the continued reprisals, I called the Solicitors office and talked to the supervisory Solicitor, Ms Sharon Blackwell she referred me to Mr. Rice, Mr. Steinmetz's supervisor. Mr. Rice said that Mr. Steinmetz denied telling me that he would not allow me to return to Horton Kansas to work for the BIA.

Mr. Rice said he believed Mr Steinmetz and if I kept repeating this information that he would burn me.
I consider this a death threat and request the Court to take the necessary legal action to prevent him from killing me as he will have to kill me to burn me.

The EEO case investigation was assigned to Teton Associates, a company owned and operated by William Collier, a retired BIA Anadarko Area Director, that didn't investigate the real problems. He just covered them up.

The Kansas Human Resources Department Referee, Mr Thomas Henderson,determined "In the referee's judgment the claimant resigned because of harassment from the employer and the claimant has established good cause for his decision to leave on April 19, 1991."

BIA-94-052--This case is a reprisal case. Due to accusations from Jeanie Cooper that fraudulently filled an objection on an OPM Standard Form #62. I was removed from the Office of Personnel Management certificate of eligible applicants after I had applied and qualified for the

Soil Conservationist position they had advertised for the Bureau of Indian Affairs. Jeanie Cooper did not request authority to fill the position. The position was filled with a non-Indian applicant. I was the best qualified applicant by 5 OPM points. I also qualified as an Indian preference applicant which made me the only qualified applicant for the position as long as my name was on the certificate.
My name was removed from the certificate of eligible applicants and I was placed under OPM investigation to see if I was qualified for the position sought. I received a favorable decision from the investigation that I was qualified for the position and the OPM was directed to place my name back on the register.

Plaintiff contacted the EEO Counselor and he directed the Plaintiff to contact the Superintendent about the favorable decision from the OPM Investigation. The Bureau of Indian Affairs refused to honor the OPM Investigation that they had instigated.

The applicant that was hired under the OPM certificate only worked a year and then resigned. He told the Plaintiff that he "couldn't take it any longer".

The Chief Personnel officer of the Bureau of Indian Affairs ordered the Anadarko Area Personnel Officer to place my name back on the list of qualified applicants for the position after it was readvertised and the the Personnel Officer did not honor the directive. The BIA refused to honor the OPM investigation even after the position was vacant again due to continued reprisal actions.

This case was investigated by a BIA contractor but he didn't have the intergity to include the OPM investigation in his report. The EEOC judge would not allow the Sheriffs affidavit into the record concerning the facts of the marijuana drug problem that I reported and was accused of improper and incorrect actions even though I was under verbal orders to report all marijuana I observed. The drug problem was included in the OPM report.

BIA-95-027--This is a reprisal, race and age discrimination case. The Soil Conservationist Position at the Bureau of Indian Affairs Horton Agency was readvertised, after it became vacant, in a BIA personnel vacancy announcement. I reapplied for this position again but the BIA personnel officer refused to honor the OPM investigation and the BIA Chief Personnel Officer directive to place my name on the list as a qualified applicant. A young non-Indian applicant was hired which violated the age and Indian preference requirements.

BIA-99-045--This is a reprisal case. This case involves my application for the Superintendents position at the Horton Agency. This position was advertised at the GS-13 level which was the grade of the Superintendent position. I was among the qualified applicants. There were several qualified applicants at the GS 13 level but none of them were hired. The position was downgraded to a GS 12 level and the person hired was working at the GS 11 position.

There was a GS 14 level applicant and several other qualified GS 13 level applicants. The Area Director noted that all applicants were minimally qualified but the fact was that the hiring process was manipulated so much that it made a mockery of the selection system.

Reprisal was excercised in the down grading of the position so the person hired could qualify. Reprisal was also used in the rating of my qualifications which limited my consideration for the position.

This case was never investigated as required in the EEOC process which further shows the discrimination involved in the hiring process and the EEOC procedures that were not followed.

Title VII, 42 U. S. C. 2000e-2(a)(1) and -3 makes it unlawful to discriminate because of an individual's race or sex to discriminate against an individual because he has opposed an unlawful employment practice or participated in an investigation or proceeding involving such a charge.

The Age Discrimination in Employment Act, 29 U. S. C. 633a (ADEA) extends the ADEA to federal employment and makes it unlawful to discriminate on the basis of age. The Howard Wheeler act, aka Indian Reorganization Act of 1934 and Indian Preference Act requires that qualified Indian people be hired for Bureau of Indian Affairs positions when available. Indian Preference was also required in the General Allotment Act of 1887.
The Supreme Court decision Morton V Mancuri also established the Indian Preference in hiring for Bureau of Indian Affairs positions.

The Personnel Officer, Ms Evelyn Gomez, requested me to file the first case which was BIA-091-31 to help correct the problems that caused my resignation and she told me that I would receive reinstatement and back pay if I received a favorable decision in the EEO process. I am requesting these damages as promised and provided in the EEO regulations but would settle for the back pay with interest at the same rate that I have been charged on my funds that I had to withdraw to live on while fighting these discrimination actions. I received a favorable decision on the initial negotiated settlement by the EEO Counselor but the BIA refused to follow through and honor the settlement terms agreed upon.

The State of Kansas determined that I was harassed to the point that I established good cause for my resignation. The OPM investigation determined that I was suitable for the position sought as Soil Conservationist but the BIA refused to honor it and abide by the requirements.

I was threatened by Martin Steinmetz that he would not allow me to return to the Horton Agency, in Horton Kansas even if I received a favorable ruling from the EEO process. I am currently under another threat from Mr Rice from the Solicitors Office in Tulsa Oklahoma. Mr. Rice threatened to burn me if I kept repeating the above situation that Mr Steinmetz threatened me with. Both of these are terroristic

threats one which has been carried out and another still pending. Mr. Rice's threat is a death threat as he will have to kill me to burn me. I request the Court to turn this over to the proper authorities to prevent my death at the hands of Mr. Rice or any other official of the US government as result of his threat.

REASONS FOR GRANTING THE WRIT

Conflict of federal decisions

The Tenth Circuit Court of Appeals affirmed the District Courts Summary Judgment by dismissing part of the district court decision.

The Merit Systems Protection Board dismissed the claim that I was forced to file with (MSPB) by the District Magistrate Judge due to untimeliness and lack of jurisdiction but they also determined that Evelyn Gomez,the BIA Anadarko Area Personnel Officer, had no authority to make the negative decision to deny Richard L. Beams employment by not honoring the Office Of Personnel Management favorable decision regarding my favorable decision concerning the Suitability investigation. She did not return my name to the Certificate of Eligible job applicants. This action is illegal and compensation for this loss of employment should be made. Jeannie Cooper, was not the Area Personnel Officer at the time that she signed her name to that title on the Standard form #62 that had my name removed from the OPM Certificate of eligible applicants. This was an illegal act.

Conflict of State and Federal Decisions

The State of Kansas Department of Human Resources Review Board affirmed upon appeal of Linda Saunders, Agency Superintendent, the Referee's decision that I had been harassed to the point that I was justified in resigning my position as the Soil Conservationist at the Horton Agency April 19, 1991. The MSPB Administrative

Judge, Joseph Hartman claimed that MSPB did not have Jurisdiction due to his opinion that I was not coerced into resigning. The Superintendent's own Secretary testified that she would have also resigned if she had been harassed as I had.

CONCLUSION

For the foregoing reasons, I pray that the court will grant a writ of certiorari to help resolve problems that I have encountered during the past 14.5 years since my initial resignation due to the discrimination and harassment I and my family have endured.

Respectfully submitted,

Richard L. Beams

Richard L. Beams,
Petitioners
6400 State Route 241
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98944

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT COURT

RICHARD LEE BEAMS,
Plaintiff-Appellant,

v.

No. 04-3393
(D.C. No. 03-CV-4072-JAR)
(Dist. Kan.)

GALE NORTON, Secretary of Department of Interior,

Defendant-Appellee.

ORDER AND JUDGEMENT*

Before SEYMOUR, KELLY, and MURPHY Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Richard Lee Beams appeals from district court orders that dismissed his Indian Preference (IPA) claim for lack of subject matter jurisdiction and failure to state a claim, *see* 25 U.S.C. 472, and entered summary judgment on his discrimination and retaliation claims, 29 U.S.C. 633a; 42 U.S.C. 2000e-16.

We review a dismissal for lack of subject matter

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judica, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3

jurisdiction de novo. *Radil v. Sanborn Western Camps, Inc.*, 384 F.3d 1220, 1224 (10th Cir.2004). Whether a private right of action is a jurisdictional concern, *Hancock v. Blue Cross-Blue Shield of Kansas, Inc.*, 21F.3rd 373, 374 (10th Cir. 1994), which turns on "whether Congress intended to create the private remedy asserted." *Southwest Air Ambulance, Inc. v. City of Las Cruces*, 268 F.3d 1162, 1169 (10th Cir. 2001) (*quoting Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 16 (1979). As for orders granting summary judgment, our review is de novo, *Alexander v. Oklahoma*, 382 F.3d 1206, 1215 (10th Cir. 2004), to determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P 56(c).

After reviewing the parties' briefs, the record, and the applicable law, we conclude that the district court did not err in dismissing appellant's IPA claim and entering summary judgment on appellant's discrimination and retaliation claims. According, we affirm the challenged decisions for suitability the same reasons stated by the district court in its July 30, 2004, and September 7, 2004 orders.[1]

Entered for the Court
Micheal Murphy
Circuit Judge

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1 We decline to adopt that portion of the district court's July 30, 2004 decision that examines Beams' IPA claim under Federal Rule of Civil Procedure 12 (b)(6) and finds a failure to plead a claim for non-monetary relief under the Administrative Procedure Act, *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 101-02 (1989).

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS
RICHARD LEE BEAMS,

Plaintiff,

V. Case No 03-4072-JAR

GALE NORTON, SECRETARY
OF THE INTERIOR

Defendant,

MEMORANDUM ORDER AND OPINION
GRANTING MOTION TO DISMISS
INDIAN PREFERENCE CLAIM

This comes before the Court on defendant's motion to dismiss or for summary judgment on plaintiff's Indian Preference Act Claim. (Doc. 41). Because the Indian Preference Act does not confer a private right of action, and because the United States has not waived sovereign immunity, the Court lacks subject matter jurisdiction over this claim. Furthermore, plaintiff fails to state a claim for relief because he has failed to properly assert or plead a claim for non-monetary relief. Thus, this claim is dismissed.

Background

This is an action brought by plaintiff Richard Lee Beams, pro se, under Title VII of the Civil Rights Act of 1964, alleging employment discrimination (failure to employ and retaliation) on the basis of race or color (American Indian) and sex (male) and further under the Age Discrimination in employment Act.[1]

[1] 29U.S.C. 621 *et seq.*

Plaintiff complains of four discrete employment actions: a reverse sex discrimination claim arising from his resignation as Soil Conservationist in Horton Kansas (BIA Complaint # 91-031); a retaliation claim arising out of plaintiff's unsuccessful demand that he be placed back in the Soil Conservationist position (BIA Complaint #94-052); a claim for failure to employ based on race, age and retaliation, concerning plaintiff's 1994 application for another Soil Conservationist position (BIA Complaint #95-027); and a claim for failure to employ based on race, age and retaliation concerning plaintiff's 1998 application for a Superintendent position. In an order entered February 26, 2004, United States Magistrate Judge K. Gary Sebelius granted in part plaintiff's leave to amend the complaint, ordering that plaintiff's complaint as related to BIA Complaint #95-027, be treated "as including a claim under the Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, 25U. S. C. 1461 *et seq.*." Defendant then moved to dismiss or for summary judgment on this claim.[2]

Pro Se Plaintiff

Because plaintiff appears pro se, the court must remain mindful of additional considerations. A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard that pleadings drafted by lawyers.[3] Thus, if a pro se plaintiff's complaint can reasonably be read "to state a valid claim on which the plaintiff could prevail, it

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[2]Defendant has also moved for summary judgment on all claims (Doc.29), including the claim at issue in this motion. The Court addresses the summary judgment motion in a separate order.

[3]*Hall v. Bellmon*, 935 F.2d 111\06, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)).

[the court] should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements."[4] However, it is not "the proper function of the district court to assume the role of advocate for the pro se litigant."[5] For that reason, the court should not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues,"[6] nor should it "supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf."[7]

Discussion

Plaintiff claims that defendant engaged in race and age discrimination, and retaliation in failing to hire him for a Soil Conservationist position he applied for in 1994 (BIA Complaint # 95-027). Plaintiff further asserts that "a non-Indian preference applicant was hired which violated the age and Indian Preference requirements." In 1934, Congress passed the Indian Reorganization Act, which is codified at 25U.S.C.1461, *et seq.* The Indian Preference Act("IPA")[8] is part of the Indian Reorganization Act ("IRA"). Defendant moves to dismiss for lack of subject matter jurisdiction on the premise that the IPA does not give rise to a private cause of action or private remedy and that defendant has not waived sovereign immunity with respect to any claim for monetary damages. Defendant also moves to dismiss for failure to state a claim.

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[4] *Id.*

[5] Id.

[6] *Drake v. City o Fort Collins*, 927 F .2d 1156, 1159 (10th Cir. 1997) (Citations omitted)

[7] *Whitney v. State of New Mexico*, 113 F.3d 1170, 1174-74 (10th Cir. 1997) (citing *Hall*, 935 F.2d at 1110).

[8] 25 U.S.C. 472 *et seq.*

Dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction

Since federal courts are courts of limited jurisdiction, there is a strong presumption against federal jurisdiction.[9] A court lacking subject matter jurisdiction "must dismiss the case at any stage of the proceeding in which it becomes apparent that such jurisdiction is absent."[10] When a defendant brings a Rule 1212(b)(1)[11] motion to dismiss for lack of subject matter jurisdiction, the plaintiff must carry the burden of proving jurisdiction.[12]

Defendant first argues that the court lacks subject matter jurisdiction, because the IPA does not confer a private right of action, nor a private remedy, to a private individual. Only Congress can create such a private right.[13]

In order to infer Congressional intent to create a private cause of action, a court must employ the four factor test dictated by the Supreme Court in *Cort v. Ash*:[14] (1) whether plaintiff is part of the class for whose benefit the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create or deny a private right of action; and (4) whether the cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law.[15]

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[9] *Penteco Corp. Ltd. Partnership--Union Gas System, Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991).

[10] *Id. (quoting Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)).

[11] Fed. R. Civ.P. 12(b)(1).

[12] *Mounkes v. Conklin*, 922 F. Supp. 1501, 1505 (D. Kan. 1996).

[13] *Alexander v. Sandoval*, 532 U. S. 275 (2001)(Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress).

[14] 422 U.S. 66, 78 (1975). [15] *Id* (citations omitted)

In the years following its decision in Court, the Supreme Court has emphasized and given most weight to the second factor, congressional intent.[16] Congress did not explicitly express such an intent in the statue itself, which states:

> The Secretary of Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.[17]

Congress can express its intent either explicitly, or by implication. As the Tenth Circuit recently noted in *Boswell v. Skywest Airlines, Inc.*,[18] the test for determing if a statute creates a private cause of action has been "effectively condensed into one--whether Congress expressly or by implication, intended to create a private cause of action."[19] Thus: The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.[20]

The Supreme Court has already analyzed the legislative history and Congressional intent associated with implementation of the IPA. In Morton v. Mancari,[21] the Supreme Court reviewed the legislative history of Indian

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[16] *See, e.g.., Touche Ross & Co. v. Redington*, 442 U. S. 560, 578 (1979).

[17] 25 U. S. C. 472 [18] 361 F .3d 1263 (10th Cir. 2004).

[19] *Id.* at 1267 (citations omitted).

[20] *Id.* (quoting *Sandoval*, 532 U.S. at 286-87).

[21] 417 U.S. 535 (1974)

preferences leading up to and culminating in the IPA, 25 U.S.C. 472, which is also referred to as Section 12 of the Indian Reorganization Act of 1934 (IRA), which is also known as the Wheeler-Howard Act, 25 U.S.C. 461, *et seq.*[22] In reviewing the legislative history of the IRA, the Supreme Court noted that:

> The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life. The preference directly at issue here was enacted as an important part of the sweeping Indian Reorganization Act of 1934. The overriding purpose of that particular Act was to establish machinery, both politically and economically. Congress was seeking to modify the then-existing situation whereby the primarily non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian Tribes.
>
> .....
>
> One of the primary means by which self-government would be fostered and the Bureau made more responsive was to increase the participation of tribal Indians in the BIA operations. In order to achieve this end, it was recognized that some kind of preference and exemption from otherwise prevailing civil service requirements was necessary.
>
> Congress was well aware that the proposed preference would result in employment disadvantages within the BIA for non-Indians. Not only was this displacement unavoidable if room were to be made for Indians, but it was explicitly determined that gradual replacement of non-Indians with Indians within the Bureau was a desirable

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[22] *Id.* at 537

[23] *Id.* at 541-44 (citations omitted)

feature of the entire program for self-government.[23]

While this legislation's purpose was to increase the participation of Indians administering matters affecting Indian tribal life, nothing on its legislative history suggests that its purpose was to benefit individual Indian job applicants. Rather, this legislation's purpose was to advance self-government among Indian tribes. The Bureau of Indian Affairs (BIA)), an agency of the United States Department of Interior that had been staffed by primarily non-Indians, would become an agency run by Indians.[24] To that end, the Secretary of the Interior has implemented regulations pursuant to the IRA that pertain to the BIA.[25] Part 5 of these regulations relate to Indian Preference in employment.[26]

One instructive case, concerning a similar statute, is *Solomon v. Interior Regional Housing Authority*.[27] In *Solomon,* the Ninth Circuit, in applying the second *Cort* factor, found no explicit or implicit Congressional intent to protect Indian Job applicants, in employment preference provisions of the Indian Self \-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. 450e(b).[28] In *Solomon,* the plaintiff was a Native Alaskan seeking monetary damages for a claimed violation of the Indian preference provisions when the Native Alaskan housing authority hired a non-Indian instead of him. The housing authority was federally funded and subject to the provisions of the ISDEAA. The Ninth Circuit found no Congressional intent to provide a private cause of action to a disappointed Indian job applicant. Rather, "Congress intended to allow Indian people and tribes greater freedom in self-governance

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[24]*See Mescalero Apache Tribe v. Hickel,* 432 F.2d (10th Cir. 1970), *cert.denied,* 401 U.S. 981 (1971).

[25]*See* 5 C.F.R. 5.1 5.1. *et seq.*

[26]*See* %C.F.R. 5.1. *et seq.*

[27] 1194 (9th Cir. 2002). [28]*Id.* at 1196-98

at the tribal or community level, not to confer individual rights on individual Indians."[29]

There is simply nothing in the legislative history of the IRA and IPA from which a private right of action can be inferred or implied. Not only is there no explicit creation of a private right of action in either the IPA or IRA, there is no explicit or implicit creation of a remedy for an individual claiming a violation of the IPA. Plaintiff is, therefore precluded from pursuing a claim for violation of the IPA in this case, and that claim must be dismissed.

For other reasons, this claim must be dismissed for lack of subject matter jurisdiction. Plaintiff's IPA claim is an action for monetary damages against the Secretary of Interior in her official capacity, and, as such, the action must be construed as one actually brought against the United States.[30] Instead of naming the United States as a defendant, plaintiff has improperly named the head of an agency as the defendant. The only proper defendant, if any would be the United States.[31]Thus, plaintiff has failed to assert a claim against the proper party, and his claim against the Secretary of Interior must be dismissed.

Moreover, it is well established that the United States is immune from suit except as it consents to be sued.[32] Any waiver of sovereign immunity must be strictly construed.[33] The terms of consent to be sued in any court define that court's jurisdiction to entertain the suit.[34] A court has no subject matter jurisdiction over the United States unless a

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[29]*Id.* at 1198

[30]*Kentucky v. graham*, 473 U.S. 159, 166 (1985)

[31]*See Denny v United States Postal Service*, 916 F. Supp. 1081, 1083 (D Kan. 1996)

[32]*United States v. Orleans*, 425 U.S. 807 (1976).

[33]*United States v. Mitchell*, 445 U.S. 535,538 (1980). *reh'g denied*, 446 U.S. 992 (1980).

[34]*Id*

specific stature waives its sovereign immunity.[35]
Such waiver must be "unequivocally expressed." Plaintiff has not shown, nor respond to defendant's showing that the United States has not waived its sovereign immunity in an action brought under the IPA: the IPA does not equivocally or "unequivocally express" a waiver. Furthermore, the bar of sovereign immunity cannot be avoided simply by naming employees of the United States as defendants.[37] Nor do the Age Discrimination in Employment Act or Title VII confer jurisdiction over an independent claim of violation of IPA. Accordingly, this additional jurisdiction flaw requires dismissal of plaintiff's IPA claim.

Motion to dismiss under Rule 12 (b)(6) for failure to state a claim

Defendant further moves to dismiss for failure to state a claim because plaintiff has failed to properly plead or assert a claim for non-monetary relief under the IPA, and because plaintiff's Complaint actually states a claim for a suitability determination, for which review is vested exclusively in the Merit Systems Protection Board. The Court need not decide these issues, for "[w]hen a defendant seeks dismissal under Rule 12 (b)(1) and 12(b)(6) in the alternative, the court must decide first the 12(b)(1) motion for the 12(b)(6) challenge would be moot if the court lacked subject matter jurisdiction."[38] Nevertheless, the Court has determined that these claims are subject to dismissal under Rule 12 (b)(6).

A court may dismiss a complaint for failure to state a claim upon which relief can be granted."[39] Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with

[36]Mitchell, 445 U.S. at 538

[37]See Ecclesiastical Order of the Ism of Am, Inc. v. Chasim, 845 F 2d 113, 115 (6th Cir 1988)

[38]Mounkes v. Conklin, 992 F.Supp. at 1506 (citation omitted). [39]Fed.R. Civ. P. 12(b)(6)

[35] *Lehman v. Nakshian, 453 U.S. 156, 160 (1981).*

the allegations."[40] "The purpose of Rule 12 (b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged is true."[41] On a rule 12 (b)(6) motion, the court judges the sufficiency of the complaint accepting as true the well-pleaded factual allegations and drawing all reasonable inferences in favor of the plaintiff.[42] The court construes the allegations in the light most favorable to the plaintiff.[43] These deferential rules, however, do not allow the court to assume that a plaintiff "can prove facts that it has not alleged or that the defendants have violated the ...laws in ways that have not been alleged."[44] "[I]f the facts narrated by the [plaintiff 'do not s\at least outline or adumbrate' a viable claim, his complaint cannot pass Rule 12(b)(6) muster."[45]

While the defendant has not waived sovereign immunity with respect to claims for monetary relief under the IPA, the defendant acknowledges that "[i}f there is any right to proceed with an individual claim against the United States pursuant to the Indian Preference Act, it must proceed as one for non monetary relief pursuant to the Administrative Procedures Act...."[46] If the Court had subject matter

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[38]Mounkes v. Conklin, 922 F.Supp. at 1506 (citation omitted) [39]Fed. R. Civ. P. 12(6)(6)

[40]Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984) (citation Omitted)

[41]Mounkes, 922 F.Supp. at 1506 (quotation omitted).

[42] Shaw v Valdez, 819 F.2d 965,968 (10th Cir. 1987)

[43] Scheuer v. Rhodes, 416 U.S. 232, 236 (1974): Hall V. Bellmon, 935 F.2d 1106,1109 (10th Cir. 1991).

[44] Associated General Carpenters v. California State Council of Carpenters, 459 U.S. 519,526 (1983) (footnote omitted)

[45] Mounkes v. Conklin, 922 F. Supp. at 1506 (citing Gooley v. Mobil Oil Corp., 851 F.2d 513,515 (1st Cir. 1988)

jurisdiction of plaintiff's claim under the IPA, plaintiff couldonly proceed with a non monetary claim for judicial review of a final agency action. For example, in Rescales Apache Tribe v. Hickel,[47] plaintiffs involved in a reduction of force, claimed that they were entitled to an employment preference under the IPA. The court found that it had jurisdiction pursuant to 5 U.S.C. 704, as this was a judicial review of final, non discretionary agency action.[48]

This basis for jurisdiction does not preserve plaintiff's claim however, for he does not assert a claim for non monetary relief pursuant to the APA. Even under that liberal pleading standard, plaintiff's complaint is fatally defective. Plaintiff's complaint does not hint at a basis for jurisdiction under APA. More ever, not only has plaintiff failed to assert and plead jurisdiction under the APA, he has failed to assert or plead that the defendant's failure to hire him was a final non discretionary, agency decision, for which he now seeks judicial review.

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[46]5 U.S.C. 551 et seq.

[47]432 F.2d 956 (10th Cir. 1970). See also McAlpine v. United States, 112 F.3d 1429 (1oth Cir. 1997) [Department of Interior decision under Indian Reorganization Act is subject to judicial review under the APA and a failure to follow regulations is challengable under the APA of plaintiff's IPA claims, as a judicial review of a final agency action denying plaintiff's grievance challenging the Indian Service's area director's order that plaintiff resign his tribal council seat.] Also see Dionne v. Shalala, 209 F.3d705, n.3 (8th Cir. 2000)(Eighth Circuit declined to consider Title VII plaintiff's independent IPA claim, in part because plaintiff did not seek administrative review of agency decision).

[48]Id.at 958-59.

For all of these reasons, the Court grants the defendant's motion to dismiss plaintiff's IPA claim.

IT IS THEREFORE ORDERED BY THE COURT that defendant's Motion to dismiss or for summary judgment on plaintiff's Indian Preference Claim (Doc. 41 **is GRANTED.**

IT IS SO ORDERED.

Dated this 30th day of July, 2004

S/Julie A. Robinson
Julie A Robinson
United States District Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

RICHARD L. BEAMS
Appellant,

DOCKET NUMBER
SF-3443-05-0147-I-1

v.

DEPARTMENT OF THE INTERIOR,
Agency

DATE: MARCH 17,2005

Richard l. Beams, Sunnyside Washington, pro se

Martin R. Steinmetz, Esquire, Tulsa, Oklahoma for the agency

BEFORE
Carol J. Teather
Administrative Judge

INITIAL DECISION

INTRODUCTION

By petition filed November 22, 2004, appellant Richard L. Beams the actions of the agency. the Department of Interior (DOI), Bureau of Indian Affairs (BIA), in not selecting him for the position of Soil Conservationist, GS-0457-11, in Horton. Kansas in 1992 and 1994, and in not selecting him for a Superintendent position in 1998. The parties were advised there were questions as to the Board's jurisdiction over the appeal and the timeliness of the appeal, and given an opportunity to respond. Initial Appeal file (IAF) tab 2.

For the reasons set forth below, the appeal is DISMISSED for lack of jurisdiction and untimely filing.

FINDINGS AND ANALYSIS

Background

Appellant was a Soil Conservationist, GS-0457-11 with the BIA Horton Agency in Horton Kansas. in April 1991, Linda Saunders, the Superintendent, Horton Agency, and appellant's supervisor, proposed to suspend appellant for 14 days for reasons of insubordination, refusal to cooperate, disregard of orders and directives, and inattention to duties.[1] Appellant resigned from his position on April 19, 1991, because of dissatisfaction with his supervisor.[2]

In August 1992, appellant's former GS-11 Soil Conservationist position was advertised by the agency through the office of Personnel Management (OPM) under Vacancy Announcement No. CW-2-0337.[3] Appellant applied for the position and was listed on the certificate of eligibles. In a memorandum dated September 21,1992, Superintendent Saunders objected to applicant's name on the list of eligible candidates, and a formal objection was filed with OPM.[4] Appellant did not get the position and another candidate, Eugene Harter, was selected.[5]

Following the subsequent resignation of Mr. Harter, the Soil Conservationist position at the Horton Agency was once again advertised in 1994 under Vacancy Announcement AN-94-36.[6] Appellant applied for the

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1 See Equal Employment Opportunity Commission decision, page 4 and Declaration Linda Saunders, Agency Response File (ARF) tabs 4f,4k,4o. The Agency Response File is located in volume 2 of the Initial Appeal File.

2 See resignation and Standard Form 50 (SF-50), Agency Response File)ARF) tab 4i.

3 ARF tab 4h.

4 ARF tabs 4g,4h,4o.

5 ARF tab 4a

6 AFF tabs 4n,4w.

position and was found to be qualified.[7] Following receipt of applicant's application, the BIA Anadarko Area Personnel Officer, Evelyn Gomez, determined applicant was unsuitable for the position and removed his name from consideration by the selecting official.[8] Appellant was not selected for the position.

In 1998, by means of Vacancy Announcement No. AN-98-52, the BIA sought to fill the position of Superintendent, GS-0340-13, at the Horton Agency.[9] Appellant applied for the position but was not selected.[10]

Appellant appealed his non selection to the Board alleging a violation of his Indian Preference rights, discrimination and retaliation for having file Equal Employment Opportunity (EEO) complaints.

Appellant has not established the Board has jurisdiction over his appeal.

The Board's jurisdiction is not plenary but is limited to those matters over which it has been given jurisdiction by law, rule or regulation. 5 U.S.C. 7701 (a); Sturdy v. Department of the Army, 88 M.S.P.R. 502, 506 (2001). Kirwan v. Department of Transportation, 88 M.S.P.R. 445, 448 (2001). Appellant has the burden of establishing the Board has jurisdiction over his appeal. 5 C.F.R. 1201.56(a)(2)(i); Prewitt v. Merit Systems Protection Board, 133 F.3d 885, 886 (FED. CIR. 1998).

Nonselections in general

In general, the Board lacks jurisdiction over the matter of a non-selection for a position and an agency's selection process. See Brown v. Office of Personnel Management, 91 M.S.P.R. 314, 318 (2002); Edwards v. Department of Justice, 87 M.S.P.R. 518, 521 (2001); Manno v. Department of Justice, 85 M.S.P.R. 696,700 (2000);Slake

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[7] See declaration Jeannie M. Cooper, ARF tab 4n

[8] AFR tabs 4n,4q,4s,4t. [9] AFR tabs 4ff, 4hh-4jj.

[10] AFR tabs 4x-4bb, 4dd, 4ee

v. Department of the Treasury, 53 M.S.P.R 207, 210 (1992). An agency's failure to select an applicant for a vacant position is generally not appealable to the Board. Prewitt v. Merit Systems Protection Board, 133 F.3d 885,886 (Fed. Cir. 1998); Ellison v. Merit Systems Protection Board , 7 F.3d 1031,1034 (Fed. Cir. 1992) (non-selection for promotion: Diamond v. U.S. Postal Service, 51 M.S.P.R 448, 450 (1991) (non-selection for appointment) aff'd 972 F.2d 1353 (Fed. Cir. 1992) (table). Claims of unlawful conduct in the selection process ordinarily must be brought before other forums. See Prewitt v. Merit Systems Protection Board,, 133 F.3d at 886. See also Saunders v. Merit Systems Protection Board, 757 F.2d 1288,1290 (Fed. Cir. 1985) (5 U.S.C. 2302(b) is not an independent source of Board jurisdiction and does not itself authorize an appeal); Patton v. Department of Health and Human Services, 19 M.S.P.R. 197, 199 (1984) (An allegation of a prohibited personnel practice standing alone does not confer jurisdiction on the Board.)

SUITABILITY

The board has jurisdiction to consider non-selections that are the result of suitability determinations made by the Office of Personnel Management (OPM) or made by agencies under delegated authority from OPM.. 5C.F.R. 731.501; Metzenbaum v. General Services Administration, 83 M.S.P.R. 538, 541 (1997). To establish the Board has jurisdiction over his appeal as a suitability appeal, appellant must show that the position he sought was in the competive service, the agency had delegated authority from OPM to make suitability determinations, and the agency's decision not to select him for the position was a negative suitability determination within the meaning of 5 C.F.R. Part 731. See Saleem v. Department of Treasury, 88 M.S.P.R. 151, 155 (2001): Metzenbaum v. General Services Administration, 83 M.S.P.R. 151,155 (1999).

The record reflects that appellant was listed on the

certificate of eligibles for the Soil Conservation position at the Horton Agency for which he applied in 1992. ARF tab 4e. The Superintendent of the Horton Agency, Linda Saunders, objected to appellant's name on the certificate based on his performance while previously employed at the Horton Agency, and the objection was sustained by OPM. ARF tabs 4e, 4g. A non-Indian, Eugene Harter, was selected for the position. ARF tab 4o. While an appeal to the Board of a formal OPM negative suitability determination is specifically provided for by 5 C.F.R. 731.508 (1992), there is no statutory or regulatory provision for an appeal to the Board of an OPM-sustained objection by an agency to certification of an employee's eligibility doe selection. Vislisel v. Office of Personnel Management, 29 M.S.P.R 679.682 (1986), aff'd 802 F.2d 472 (Fed. Cir. 1986) (table).\, overruled on other grounds, Edwards v. Department of Justice, 87 M.S.P.R 518, 523 (2001).

There is no evidence that either OPM or the agency under delegated authority rendered a negative suitability decision under 5 C.F.R. Part 731 in connection with appellant's 1992 application for the position of Soil Conservationist with the Horton Agency. In fact, the evidence is to the contrary. After initially sustaining the BIA's objection to appellant's name on the certificate of eligibles , OPM forwarded his 1992 application for the Soil Conservationist position for investigation and a suitability determination under 5 C.F.R. Part 731. See OPM letter to appellant dated December 16, 1993, ARF tab 4b. On October 19, 1993, OPM advised appellant of the results of its investigation, and gave him an opportunity to respond. Id. Subsequently, by letter dated December 16, 1993, OPM informed appellant that u\it had made a "favorable determination and accepted (his) application" for the position of Soil Conservationist. Id. OPM further advised appellant that his application was being returned to OPM's Wichita Service Center where it would be available for

referral to interested agencies as vacancies occur. Id. Thus, I find appellant was found by OPM to be suitable for employment as a Soil Conservationist. I, therefore, conclude that applicant suffered no action appealable to the Board in connection with his 1992 application for the position of Soil Conservationist.

Appellant's 1994 application for the Soil Conservationist position under Vacancy Announcement No AN-94-036 was evaluated by the Personnel Office for the BIA Darkeners Area Office, and, and he was initially determined to be qualified for the position.[11] See declaration Jeannie Cooper, ARF tab 4n. Subsequently, however, the BIA Darkeners Area Officer, Evelyn Gomez, determined that appellant was not suitable for the position, and his name was removed from the list of names to be considered by the selecting official. See declaration of Jeannie Cooper, affidavit of Evelyn Gomez, ARF tabs 4n4p4q, and 4t. Ultimately, a non-Indian, Waldo Leander was selected for the Horton Agency Soil Conservationist position under Vacancy Announcement No. AN-94-036. ARF tabs 4n and 4o.

Ms. Gomez claimed to have rendered a negative suitability determination under 5 C.F.R. Part 731 in connection with appellant's application for the Soil Conservationist position under Vacancy Announcement No. AN-94-036. ARF tabs 4p,4q. According to Ms. Gomez, she made the negative suitability determination under authority of the OPM suitability determination letter dated December 16, 1993, Qualification Standards X118, Federal Personnel Manual(FMP) 338, and FPM 731-3. ARF tab 4p. I find, however, the record lacks support for Ms. Gomez position regarding her authority to make suitability determinations under 5C.F.R. Part 731.501.

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[11] Appellant applied for the 1994 vacancy under Vacancy Announcement No. AN-94-036 directly with the agency outside of a civil Service register.

PUBLISHER'S NOTE:

THE FOLLOWING PAGE WAS UNAVAILABLE FOR FILMING:

of applicants" does not constitute a delegation of such authority. Rather, it is simply intended to inform appellant that agencies also have a say in deciding who they hire for a position, and that although his eligibility will provide him with full consideration for any position, and that although his eligibility will provide him with full consideration for any position for which he is qualified, it is not a guarantee that he will be appointed to the position. See OPM suitability decision, ARF tab 4b.

I find a preponderance of the evidence does not show that the BIA Anadarko Area Personnel Officer had delegated authority to make a suitability decision under 5 C.F.R Part 731 when she found appellant unsuitable for the Soil Conservationist position at the Horton Agency, and removed his name from the list of eligibles to be considered by the selecting official. I therefore, conclude that appellant did not suffer an action appealable to the Board in connection with his 1994 application for a Soil Conservationist position at the Horton Agency.9 There is also no evidence that OPM or anyone with delegated authority made an adverse suitability decision under 5 C.F.R. Part 731 with respect to appellant's application for the Superintendent position in 1998. The record reflects that the candidates found to be qualified for this position, including appellant were evaluated and ranked by a panel, and that the candidates with scores of 12 or above were referred for selection consideration. ARF tab 4x. Appellant was not found unsuitable for the position. He simply did not obtain a high enough ranking score to be considered.

An agency may only make a suitability determination upon a grant of authority by OPM. Metzenbaum v. General Services Administration, 83 M.S.P.R 243, 246 (1999); Stiles v. Department of the Navy, 36 M.S.P.R 646,648 (1988. Appellant failed to establish that an agency official acting on delegated authority, from OPM or the head of the

agency, made an adverse suitability decision in connection with his applications for the positions of Soil Conservationist and Superintendent with his appeal of his nonselection under 5 C.F.R. Part 731. See 5 C.F.R. 731.103 (d) (1994); 5 C.F.R. 731 .103 (g) (2004).
See, e.g., Brady v. Department of the Treasury, 94 M.S.P.R 439, 441-442 (2003); Metzenbaum v. General Services Administration, 83 M.S.P.R 243, 247 (1999).

Indian Preference

Appellant's allegation of a violation of his Indian Preference rights also does not confer jurisdiction on the Board. There is no law, rule or regulation giving the Board jurisdiction over a violation of Indian preference rights absent an otherwise appeable matter[12] As previously indicated, the Board lacks jurisdiction over a nonselection action. Thus, the Board lacks authority to consider appellant's allegation of a violation of his Indian preference rights.

Discrimination and Reprisal

Appellant's allegations of discrimination on the base of his race, sex and age and retaliation for having filed Equal Employment Opportunity complaints do not confer jurisdiction on the Board. Absent an otherwise appealable action, the board does not have jurisdiction to consider allegations of discrimination and reprisal prohibited by 5 U.S.C. 2302 (b). Metzenbaum v. General Services Administration, 83 M.S.P.R 243, 248 (1999); Wren v. Department of the Army, 2 M.S. P.R.1, 2 (1980) (5 U.S.C. 2302 (b) is not an independent source of Board

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[12] Appellant is not a veteran. See Certificate of Eligibles and Standard Form 50, ARF tabs 4e and 4i. Thus, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the Veterans' Employment Opportunities Act of 1998 are not applicable to this case.

jurisdiction), aff'd, 681 F.2d 867, 871-73 (D.C. Cir. 1982).

Conclusion

Appellant has not established the Board has jurisdiction over his appeal of the agency's in failing to select him for the positions of Soil Conservationist in 1992 and 1994, and Superintendent in 1998.__

Timeliness.

Even assuming the Board has jurisdiction over appellant's appeal of the 1994 nonselection as a negative suitability decision, the appeal is untimely and appellant has not shown good cause for waiver of the time limit. In 1994, an appeal to the Board had to be filed within 20 calendar days of the effective date of the action appealed or within 25 calendar days of the effective date of the action appealed or within 25 calendar days of the date of issuance of a final decision that does not set an effective date. 5 C.F.R. 1201.22(b) (1994). In the year 2000, the time limit for filing an appeal with the Board was 30 calendar days after the effective date, if any, or 30 calendar days after the date of receipt of the agency's decision, whichever is later, 5 C.F.R. 1201.22(b)(2000). Appellant did not file his appeal of actions that occurred in 1992, 1994 and 1998 until November 22, 2004. The appeal, therefore was untimely by approximately 10 years.

If the agency made an adverse suitability decision under 5 C.F.R. Part 731 when it removed appellant's name from the certificate of eligibles in 1994, it should have notified appellant of his right to appeal the agency's decision to the Board. See 5 C.F.R. 731.103(d) and 731.303(e) (1994). It is undisputed that it did not do so.

The Board ordinarily will excuse untimeliness in filing an appeal, if an agency should have given notice of a right of appeal but did not, so long as the appellant acted promptly and within the allowable time limits once he was aware of the basis of his claim. Makse v. Department of Veterans Affairs, MSPB Docket No.CH-0752-04-0099-I-1,

slip op. at 11 (Mar. 7, 2005; Gingrich v. U. S. Postal Service, 67 M.S.P.R 583, 587-588 (1995). An applicant who should have been advised of his appeal rights, but was not, is not required to show that he exercised due diligence to discover his appeal rights. Rather the question is whether the appellant was diligent in filing an appeal once he learned that he could do so. Gingrich v. U. S. Postal Service, 67 M.S.P.R. at 588. See also Gordy v. Merit Systems Protection Board, 736 F.2d 1505, 1508 (Fed. Cir.1984). I find appellant did not show such diligence. Appellant was advised that his appeal was untimely and given an opportunity to show good cause for the delay. IAF tab2. He responded by stating that he filed his appeal after receiving the July 30, 2004, decision of District Court Judge Julie A. Robinson dismissing his claim under the Indian Preference Act. In her decision, Judge Robertson, stated that appellant's complaint actually stated a claim for a suitability determination, "for which review is vested exclusively in the Merit Systems Protection Board."IAF tab 7. Appellant also pointed out that he had not received any appeal rights in connection with his non selection. Id. Appellant was aware of the existence of the Board as evidenced by the fact that he had appealed his resignation from the position of Soil Conservationist at the Horton Agency to the Board. See Beams v. Department of the Interior, MSPB Docket No. DE07529019911 (Initial Decision May 19, 1992), IAF tab 14, pages 77-92. Furthermore, he was made aware of the regulations governing suitability contained at 5 C.F.R. Part 731 during the course of an Equal Employment Opportunity Commission (EEOC) hearing in August 2000 involving his 1994 nonselection. See ARF tab 4m, pages 88-89, 105;affidavit of Martin R. Steinmetz, ARF tab 41. He was also provided with a copy of 5 C.F.R. Part 731 at this hearing. Id. Thus, I find that at least in August 2000,appellant was aware that by reason of receiving a

copy of the applicable regulations at 5 C.F.R. Part 731, appellant knew or should have known in August 2000 that he had a right to appeal that decision to the Board. Yet,

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[5] See Memorandum Order and Opinion Granting Motion to Dismiss Indian Preference Claim in Richard Lee Beams v. Gale Norton, Secretary of the Interior, case No. 03-407-JAR (Dist.Ct. District of Kansas, July 30, 2004), IAF tab 1. appellant did not file such an appeal until over 4 years later in November 2004.

In addition, appellant was notified that agency actions dealing with suitability determinations can be appealed to the Board in a "Motion In Support of Defendant's Motion To Dismiss or for Summary Judgment As to Plaintiff's Indian Preference Act claim" which was mailed to him on April 26, 2004. ARF tab 4j. On page 17 of the Motion, the Assistant United States Attorney states that a challenge to suitability determinations is vested exclusively in the Merit Systems Protection Board. Id Yet, appellant waited until November 2004 to file an appeal with the Board.

I find appellant has not shown that he acted promptly to file an appeal with the Board after he was notified of his right to appeal a suitability decision to the Board under 5 C.F.R. Part 731. Under these circumstances, I find he is not entitled to waiver of the time limit. The Time limit is not waived and appellant's appeal is dismissed as untimely.

DECISION

The appeal is DISMISSED

FOR THE BOARD: Signed
Carol J. Teather
Administrative Judge

Office of Personnel Management
Investigation decision
Suitability for Soil Conservationist Position
at the Horton Agency.

Richard L. Beams
1665 4th Ave West
Horton Kansas 66439

Dear Mr. Beams

This is in further reference to your application of August 28, 1992, for the position of Soil Conservationist, filed with the office of Personnel Management (OPM), Wichita Service Center, Wichita Kansas.

On October 19, 1993, we advised you of the results of an investigation conducted to determine your current suitability for competitive Federal employment. You were given the opportunity to comment in writing and/or submit affidavits concerning the information developed by our investigation. We furnished a copy of the material considered in proposing our action to you with our October 19, 1993, letter. Upon receipt of that information, you responded to the issues.

Your response to our proposed action letter raised several questions. You asked OPM to investigate several individuals, all involved in either your EEO complaint or your appeal to the Merit Systems Protection Board (MSPB). As discussed in a telephone conservation with you on December14, 1993, we do not have the authority to conduct investigations on those individuals.

You also said regardless of the information maintained in OPM's records, you have been banned from employment. OPM is the only agency with the authority to debar a person from competitive Federal employment. You have not previously, nor are you currently debarred from

employment.

You stated you feel your EEO complaint and MSPB were directed to other regions on purpose and requested our assistance in initiating the grievance process again in the St Louis region. Our office was not involved in those decisions and does not have the authority to reopen decisions made by EEO or MSPB.

We carefully considered all available facts, including your comments and documentation provided with your response, we have made a favorable determination and accepted your application.

Your application has been returned to OPM's Wichita Service Center where it will be available for referral to interested agencies as vacancies occur. Agencies have the responsibility to select the most highly qualified candidates from the applicants referred to them. Agencies are also responsible for adjudicating the suitability of applicants and eligibiles for, and appointees to, low risk and Non-Sensitive positions, Public Trust Risk positions, and National Security positions within the agency. Your eligibility will provide you with full consideration for all positions for which you qualify. However it does not represent a guarantee of an appointment.

Any further questions you may have regarding your August 28, 1992, application or chances for appointment should be submitted directly to OPM's Wichita Service Center. Your questions concerning other applications you have filed or actions taken by the Bureau of Indian Affairs or the OPM Wichita Service Center should be directed to those offices.

Sincerely,
Signed/
Kimberly Burns
Suitability Examiner
Suitability Adjudications Branch

BIA MEMO dated Oct 26, 1994

To: Director, Office for Equal Opportunity
From: Chief, Division of Personnel Management
Subject: Request for Competent Authority Determination

Please accept my apology for the time it has taken to reply to your inquiry. The issue involved the Bureau of Indian Affairs' (BIA) interpretation of an Office of Personnel Management (OPM) determination, rendered by the Wichita Area Office on or about October 14, 1992. The OPM determination and the BIA's interpretation may prove to be controversial and require numerous contact with experts experienced with the issues surrounding this matter.

A brief chronology would serve to place the issues of the problem in perspective. On April 19, 1991, Mr. Richard Beams, Soil Conservationist, GS-457-11, Horton Agency, BIA, was issued a proposed fourteen day suspension for several work related matters. On the same day Mr. Beams submitted a resignation of his position with the BIA. Mr. Beams' name was placed by OPM on a Certificate of e Eligible Applicants on September 11, 1992, for the position he previously encumbered and resigned from with the Horton Agency.

Mr. Beams' Certificate of Indian Blood made him the only eligible candidate which prompted the BIA Servicing Personnel Office for Horton to submit a Standard form 62 to OPM objecting to Mr. Beams name being placed on the Certificate. The OPM Wichita Area Office sustained the objection in their initial decision, but also sent the negative information regarding Mr. Beams to OPM's Branch of Suitability Adjudication. On December 16, 1993, they determined Mr. Beams to be suitable for Federal Employment.

The selecting official at Horton Agency and the Servicing Personnel Office apparently still subscribed to the initial finding of the OPM, Wichita Field Office and have refused to accept Mr. Beams as a certified candidate for the GS-457-11 Soil Conservationist position at the Horton Agency.

This office must accept the position and determination rendered by the OPM Branch of Suitability Adjudication rendered on December 16, 1993 in that the Branch Must make the final determination on whether a current or perspective employee is suitable for employment. Despite Mr. Beams proposed fourteen day suspension, there was nothing in the charges that would deem him unsuitable for federal employment. Therefore, the Servicing Personnel Office should place his name on the Certificate of Eligibles for the position of Soil Conservationist, GS-457-11, at the Horton Agency.

If you have any questions or need additional information, please contact Mr. Martin Johnson at (202) 208-2728.

KANSAS DEPARTMENT OF HUMAN RESOURCES

My initial application for unemployment assistance benefits was denied as standard practice for employee that resign their job if work remains as stated:

"The Claimant is disqualified until the claimant becomes reemployed and has earnings from insured work of $666.00. Disqualification begins 4-20-1991. The claimant left work anticipating dismissal in the near future. Work was still available. The claimant left work voluntary without good cause attributable to the work or the employer beginning the day following the separation and shall continue until after the individual has become reemployed and has had earnings from insured work of at least three times individual's weekly benefit amount."

Petitioner appealed the disqualification and the Referee's Decision was as following:

REFEREES DECISION

APPEARANCES: Richard L. Beams and Bill Brown, Witness, appeared for the claimant. Brenda Shadwick, Tribal Government Services Officer, appeared for the employer.

FINDINGS OF FACT: The claimant files a timely appeal of an examiner's decision issued May 14, 1991. The examiner disqualified the claimant from the receipt of unemployment benefits effective April 20, 1991, and continuing until he returned to work and earned $666.00. Specifically, the examiner ruled the claimant left work work voluntarily without good cause.

The claimant was last employed with the above employer (Dept. of the Interior, Bureau of Indian Affairs.) as a Soil Conservationist stationed at the Horton Kansas Office of the Bureau of Indian Affairs. The claimant was employed on a full time basis from 8:00 a.m. to 5:00 p.m., Monday through Friday, for an annual salary of approximately 43,500.00. The claimant had been at Horton

since September of 1981. The claimant had a total of 24 years of federal service.

The Claimant's last day of employment was April 19, 1991. The claimant resigned from his position at that point in time.

Earlier that day, the claimant's supervisor, Linda Saunders, had delivered to the claimant a formal notification that she was proposing to suspend the claimant from duty status without pay for two weeks.

The notice of proposed suspension indicated that there was dissatisfaction with several areas of the claimant's job performance.

The supervisor had been assigned to the Horton, Kansas office for approximately one year.

Throughout the course of that year the claimant had considerable difficulties with the supervisor.

The supervisor was observed on occasion going into the claimant's office and could be overheard yelling at the claimant. The claimant attempted to do his job to the best of his ability, but apparently could not satisfy or please the supervisor.

The claimant had been issued other written warnings and admonitions by the supervisor during the course of that one year. The tone and content of those documents are such that the claimant was criticized and degraded personally with regard to his job performance.

The claimant could have pursued a formal appeal of the suspension action. However, the claimant wanted to maintain his service record and saw no reason to remain in the position if it was clear that he was no longer wanted there.

OPINION: Kansas Law, Section 44-706 provides that an unemployed individual is disqualified from receiving benefits for the duration of his unemployment and until he returns to work and earns three times his benefit amount if he leaves work voluntarily without good cause

attributable to the work or the employer.

Kansas law does provide for certain circumstances that would constitute good cause. One of those circumstances would be if the individual is harassed by the employer.

In this case, it is the referee's judgment that this is exactly what occurred.

As indicated, the tone and content of the documents presented to the claimant would lead a reasonable person to conclude that their services really aren't desired. The tone and content is demeaning and derogatory towards the claimant.

The supervisor was overheard yelling at the claimant on several different occasions. There is absolutely no reason in the working environment today for actions of those kind and the claimant certainly is not required to tolerate such actions from a supervisor.

Finally, the notice of proposed suspension is a clear indication that the claimant was facing probable termination from the job.

Rather than contest the action he chose to resign gracefully

In the referee's judgment the claimant resigned because of harassment from the employer and the claimant has established good cause for his decision to leave on April 19, 1991

The individual most directly involved on the part of the employer did not even appear at the hearing to present any evidence or testimony, in this case.

Consequently, the examiner's decision will be reversed.

DECISION: The examiner's decision , as set out in the first paragraph above is reversed. The claimant left work voluntarily with good cause attributable to the work or the employer. He is cleared for benefit payment payments effective April 20, 1991, and continuing as long as he meets weekly eligibility requirements. Referee

IT IS SO ORDERED. Signed/ Thomas C. Henderson,

The above decision was appealed by Linda Saunders and the State of Kansas Employment Security Board of Review affirmed the referee Henderson's decision as follows:

DECISION

Now on this 6th day of September 1991, the above-entitled matter comes on for consideration by the Board of Review. After examination of the case, the Board determines to decide the matter on the record.

The Board, after reviewing all the evidence and being fully advised in the premises, adopts the findings of fact and decision of the referee rendered in this matter as though fully incorporated herein, and finds that the decision of the Referee should be affirmed.

Signed/
Board of Review
Jack Jansen, Chairman
Gary J. Roberts, Vice Chairman
Garold G. Good, Member

Supreme Court, U.S.
FILED
05-900 NOV 29 2005
OFFICE OF THE CLERK

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX----------sa 1----sa 38

Order dated September 7, 2004 Doc. 51----------sa 1

Corrected Memorandum Order and Opinion
Granting Motion for Summary Judgment
Order granted September 7----------sa2---sa-38

sa 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RICHARD LEE BEAMS

Plaintiff,

v. Case No. 03-4072-JAR

GALE NORTON, SECRETARY
OF HE INTERIOR.

Defendant.

ORDER

The Court hereby withdraws its previously filed Memorandum Order and Opinion Granting Motion for summary Judgment (Doc. 51), and directs the clerk's office to strike and remove the aforementioned Order, Docket Number 51, from the record.

Dated this 7th day of September, 2004.

S/Julie A. Robinson
Julie A. Robinson
United States District Judge

sa 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RICHARD L. BEAMS,
Plaintiff,
v. **Case No. 03-4072-JAR**

GALE NORTON, SECRETARY OF DEPARTMENT OF INTERIOR,
Defendant.

CORRECTED MEMORANDUM ORDER AND OPINION GRANTING MOTION FOR SUMMARY JUDGMENT[1]

Plaintiff, who is pro se, brings this action alleging discrimination on the basis of sex, race, and retaliation in violation of Title VII of the Civil Rights Act of 1964 and age discrimination in violation of the Age Discrimination in Employment Act. This matter comes before the Court on defendant's Motion for Summary Judgment (Doc. 29). For the reasons stated below, defendant's summary judgment motion is granted.

I. Summary Judgment Standards

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."[2] The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a

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1September 1, 2004, the Court entered a Memorandum Order and Opinion Granting On Motion for Summary Judgment (Doc. 51), which inadvertently failed to address certain claims. The previous Order has been stricken and withdrawn (See Doc. 52). This Order replaces the Court's prior Order and serve as the final dispositive ruling in this case.

2Fed. R. Civ. P. 56(c).

verdict for the nonmoving party.[3] Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[4]

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be met by showing that there is a lack of evidence to support the nonmoving party's case.[5] Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial.[6] "A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of [its] pleading, but must set forth specific facts showing that there is a genuine issue for trial."[7] Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.[8] The Court must consider the record in the light most favorableto the nonmoving party.[9]

The Court notes that summary judgment is not a "disfavored procedural shortcut"; rather,
it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action."[10]

In a pro se case, the pro se litigant's pleadings are to be liberally construed and are held to
a less stringent standard.[11]

3*See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
4*Id.* at 251-52.
5*See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).
6*See Anderson*, 477 U.S. at 256.
7*Id.*
8*See id.*
9*See Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984), *cert. denied* 469 U.S. 1214 (1985).
10*Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).
11*Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

Nevertheless, the Court is not authorized to become the advocate for the pro se litigant.[12] "Despite the liberal construction afforded pro se pleadings, the court will not construct arguments or theories for the plaintiff in the absence of any discussion of those issues."[13] Moreover, plaintiffs are not excused from compliance with fundamental rules of procedure because they are proceeding pro se.[14] Pro se litigants must follow rules of procedure, including local rules.[15]

District of Kansas Rule 56.1 governs motions for summary judgment in this district, and it provides that "[a]ll material facts set forth in the statement of the movant shall be deemed admitted for purposes of summary judgment unless specifically controverted by the statement of the opposing party."[16] Rule 56.1(b) provides as follows:

(1) A memorandum in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered by paragraph, shall refer with particularity to those portions of the record upon which the opposing party relies, and if applicable, shall state the number of movant's fact that is disputed. (2) If the party opposing summary judgment relies on any facts not contained in the movant's memorandum, that party shall set forth each additional fact in a separately numbered paragraph, supported by references to the record, in the manner requires by subsection (a) above.

12*Id.*

13*Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir. 1991).

14*Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994), *cert. denied*, 513 U.S. 1090 (1995).

15*Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992), *cert. denied*, 507 U.S. 940; *Campbell v. Meredith Corp.*, 260 F. Supp. 2d 1087, 1097 n.10 (D. Kan. 2003).

16D. Kan. R. 56.1(a).

17*Hammad v. Bombardier Learjet Inc.*, 192 F. Supp. 2d 1222, 1231, n.6 (D. Kan. 2002).

The duty to admit or deny factual allegations is not too complex of a duty to require of a pro se litigant.[17] Consequently, the failure of a plaintiff, pro se or otherwise, to admit or deny the veracity of facts set forth in a motion for summary judgment results in the facts being admitted.[18]

In this case, plaintiff has disregarded local rules, particularly the guidance provided by Rule 56.1. In response to defendant's motion for summary judgment, plaintiff has filed several documents,[19] but the only document which is even arguably responsive to defendant's statement of facts is entitled "Plaintiff's Objection to Defendant's Motion to Dismiss or for Summary Judgment." Plaintiff does not state whether he admits or denies defendant's factual contentions. Instead, he responds to some of defendant's statements of fact and ignores others. To the extent plaintiff has ignored defendant's facts, the facts will be deemed admitted.[20]

In those instances in which plaintiff does attempt to respond to defendant's statement of facts, his responses are likewise improper under local rules. Plaintiff's attempts to controvert defendant's facts, are neither concise nor do they refer with particularity to those portions of the record upon which plaintiff relies. For instance, in response to defendant's Statement of Fact No. 3, plaintiff offers a lengthy narrative in excess of two pages. The narrative contains a few references to the record interspersed throughout, but these references do not refer with particularity to the record; instead, plaintiff refers the Court to Exhibit 1, pages 202-261. The Court will not sift through nearly sixty pages of exhibits in an attempt to divine a controverted factual issue. Similar inconsistencies with

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18*Stegall v. Great Am. Ins. Co.*, 996 F. Supp. 1060, 1063 (D. Kan. 1998).

19The documents include: "Plaintiff's Objection to Defendant's Motion to Dismiss or for Summary Judgment;" "Statement of Facts;" "Background;" and "Argument."

20These statement of facts include numbers 4, 24, 25, 27-33 44-47, and 63-82.

the local rules permeate plaintiff's response.

To the extent the Court can discern a "disputed factual issue" from plaintiff's response, the "fact" is not relevant, nor is it responsive to defendant's statement of facts. Much of plaintiff's time is spent summarizing his view that he should not have been fired because he was right and his supervisors and the other employers at the Bureau of Indian Affairs were wrong. No discussion concerns plaintiff's status as a male or retaliation based upon his filing of EEO Complaints. Plaintiff's lawsuit is one of employment discrimination based upon sex, and retaliation, not one of wrongful termination without cause. As such, plaintiff's opinion that his supervisors' work was deficient, while his work was superb, is irrelevant to this action and wholly unresponsive to defendant's summary judgment motion.

The "evidence" offered by plaintiff to support his factual contentions is similarly deficient. In a summary judgment response, a nonmoving party need not produce evidence in a form that would be admissible at trial.[21] It is well established, however, that a party cannot rely on unauthenticated documents to avoid summary judgment.[22] Nor may a party rely upon inadmissible hearsay, or "generalized, unsubstantiated, non-personal affidavits" to successfully oppose a properly supported motion for summary judgment.[23] Here, plaintiff offers Exhibit 1 consisting of records, which are purportedly "Office of Personnel Manual Investigation" administrative records. The records are neither verified, authenticated, nor otherwise indicative of an officially sealed set of records. The parties have stipulated to the admissibility of administrative records that form the basis of plaintiff's

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21*Stegall*, 996 F. Supp. at 1065 n.7.

22*IBP, Inc. v. Mercantile Bank of Topeka*, 6 F. Supp. 2d 1258, 1263 (D. Kan. 1998).

23*Stegall*, 996 F. Supp. at 1065 n.7.

EEO complaints, but plaintiff's Exhibit 1 has no such stipulation. Yet another example is plaintiff's response to Statement of Fact No. 5. In his response, plaintiff refers the Court to testimony of some kind, but there is neither a cover sheet to indicate the nature of the proceeding during which the testimony arose or certification by the court reporter to verify the accuracy of the transcription. As such, the "testimony" is inadmissible. Although the Court will not discuss each evidentiary deficiency, such deficiencies abound as plaintiff's responses nearly all refer to unverified, unauthenticated documents or evidence constituting hearsay.

Plaintiff also filed a document entitled "Statement of Facts." This document fails to se forth plaintiff's factual allegations in separately numbered paragraphs. More importantly, plaintiff has not referred to the record, choosing instead to present a narrative of his version of events devoid of factual support. A conclusory, self-serving narrative falls far short of the requirements of D. Kan. R. 56.1(b). Furthermore, to the extent that plaintiff attempts to respond to defendant's statement of facts by referring the Court to his "Statement of Facts," his attempts are unavailing for "[u]nsubstantiated allegations carry no probative weight in summary judgment proceedings."[24]

The Court additionally notes that plaintiff, although proceeding pro se, is not wholly unfamiliar with summary judgment proceedings. This is the second lawsuit plaintiff has litigated in this Court. The first lawsuit, *Beams v. Norton*,[25] was resolved when defendant's motion for summary judgment was granted, and the judgment was upheld by the Tenth Circuit on appeal. In his prior lawsuit, the Court addressed plaintiff's submissions at the summary judgment stage and concluded that plaintiff's proffered facts were not facts at all, but bare allegations unsupported

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24*Phillips v. Calhoun*, 956 F.2d 949, 951, n.3 (10th Cir. 1992).
25256 F. Supp. 2d 1203 (D. Kan. 2003).

by Rule 56 evidence, and not responsive to defendant's factual contentions. Thus, plaintiff is aware that he must comply with D. Kan. Rule 56.1 and Fed. R. Civ. P. 56 to controvert defendant's factual contentions.

Finally, the Court observes that although plaintiff has provided no disputed issues of material fact, this alone does not make summary judgment proper, for plaintiff's burden to respond arises only if the motion is properly supported in the first instance.[26] "Accordingly, summary judgment is appropriate under Rule 56(e) only when the moving party has meet its initial burden of production under Rule 56(c)."[27] If the evidence presented by the moving party does not satisfy this burden, "summary judgment must be denied *even if no opposing evidentiary matter is presented.*"[28] Thus, if a nonmoving party fails to properly respond to a motion for summary judgment, the court must first examine the moving party's submission to determine if it has met its initial burden of demonstrating that no material issues of fact remain for trial and that the moving party is entitled to judgment as a matter of law.

II. Uncontroverted Facts

The following facts appearing in defendant's summary judgment motion, and which find support in the record, are uncontroverted as a matter of law.

Plaintiff, an American Indian male, brings this action alleging employment discrimination based upon his race or color, sex, and age under Title VII of the Civil Rights Actof 1964 and the Age Discrimination in Employment Act (ADEA).[29] Plaintiff complains of fourdiscrete employment actions: a reverse sex discrimination claim arising from his resignation as Soil

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26*See Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002).
27*Id.* at 1194.
28*Id.*
29*Beams v. Norton*, ___ F. Supp. 2d ___ , 2004 WL 1728485 at *1 (D. Kan. July 30, 2004).

Conservationist (BIA Complaint 91-031); a retaliation claim arising out of plaintiff's unsuccessful demand that he be placed back in the Soil Conservationist position (BIA Complaint 94-052); a claim for failure to employ based upon race, age and retaliation concerning plaintiff's 1994 application for another Soil Conservationist position (BIA Complaint 95-027); and a claim for retaliation concerning plaintiff's 1998 application for a Superintendent position (BIA Complaint 99-045).[30]

In an order entered February 26, 2004, United States Magistrate Judge K. Gary Sebelius granted plaintiff leave to amend his complaint and ordered that "the court and the parties shall treat all portions of the plaintiff's Civil Complaint (Doc. 1) related to BIA-95-027 as including a claim under the Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, 25 U.S.C. § 461 et. seq."[31] Defendant then moved to dismiss or for summary judgment on this distinct claim. This Court, in an order dated July 30, 2004, granted defendant's motion.[32] Consequently, only BIA Complaints 91-031 (reverse sex discrimination claim), 94-052 (retaliation claim), 95-027 (age and race discrimination and retaliation claims) and 99-045(retaliation claim) are now before this Court.

Complaint of Discrimination BIA 91-031

Plaintiff, Richard L. Beams, was employed with the Department of Interior (DOI), Bureau of Indian Affairs (BIA) in Horton, Kansas, ("Horton Agency"), as a Soil Conservationist. One of the primary responsibilities assigned to plaintiff as the Soil Conservationist at the Horton Agency was the completion of farm plans or lease stipulations that were to be prepared before lease sales

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[30]Pretrial Order ¶ 3.

[31]Order Granting in Part and Denying in Part Plaintiff's Motion to Amend Complaint (Doc. 28).

[32]*Beams*, __ F. Supp. 2d at __, 2004 WL 1728485.

conducted by the Horton Agency. As the Anadarko Area appraiser prior to 1991, Brian Pogue utilized farm plans prepared by soil conservationists in the local offices such as the Horton Agency. Pogue encountered problems with plaintiff's work, namely that of the approximately seventy Horton Agency farm plans that were due for the 1989-1990 year, only twenty were completed in the Horton Agency, even though a workload of seventy farm plans is not considered heavy. Moreover, the twenty completed farm plans contained incorrect information. In counseling plaintiff for these deficiencies, Pogue determined that plaintiff's record keeping system was deficient and that plaintiff interfered with appraisal functions that were Pogue's responsibility. A former Superintendent of the Horton Agency, Peggy Acoya, attempted to address these problems with plaintiff. In May of 1990, Linda Saunders became the Acting Superintendent of the Horton Agency. In August of 1990, she was permanently assigned to that position. As the Superintendent, Saunders was responsible for carrying out the mission of the office and supervising its thirteen employees. Eight months prior to the proposed suspension, plaintiff was admonished, in writing, for inappropriately influencing a tribal official to sign a document without proper tribal council authority and for embarrassing Saunders in a formal council meeting. Because of plaintiff's actions, Saunders wrote a letter of apology to the Potawatomi Tribal Council.

Six months before the proposed suspension, plaintiff was instructed, in writing, to prioritize his job tasks to bring leasing activities current and to provide completed tasks to either Saunders or Brenda Shadwick, the acting realty officer. Three weeks after being so instructed, Shadwick prepared a written memorandum to Saunders concerning the continued inadequacy of plaintiff's work on lease stipulations. In addition, plaintiff was instructed to have all farm plans

prepared before an October 1999 lease sale, but when the sale arrived, plaintiff had failed to complete most of the farm plans, and those that had been completed were inaccurate. A second lease sale was set for March 14, 1991. Again, plaintiff was instructed to complete the farm plans before the sale. To assure completion, Saunders directed plaintiff to make the farm plans his number one priority and to stop involving himself in other matters. Plaintiff was also specifically instructed that he was not to attend the actual lease sale because his primary focus and time was to be spent on the farm plans. As of the March 14, 1991 sale date, plaintiff had not completed any of the farm plans, and he attended the lease sale in direct contravention of Saunders' instructions.

On or about March 14, 1991, Saunders met with plaintiff again and instructed him to concentrate all of his time on completion of the farm plans. A week later, plaintiff checked out of the Horton office to review lease sale tracts on one of the reservations. Instead of staying on the reservation and completing the review, plaintiff visited the Jackson County Road Supervisor to discuss a road right-of-way closure. This closure was already being handled by the Horton Agency's Realty Division and plaintiff had been told to stay out of the matter. When plaintiff visited the Jackson County Road Supervisor, Ronald Karn, plaintiff gave him the impression that plaintiff had authority to make demands related to road right-of-ways. Karn contacted Saunders with concerns about plaintiff's authority and the demands plaintiff was making. Saunders confirmed Karn's concern that plaintiff did not have authority and this was not plaintiff's responsibility.

On March 22, 1991, Saunders and Shadwick, met with plaintiff to discuss the farm plans and the road right-of-way matter. During the meeting. Plaintiff refused to return to the meeting even after being told that he would be

considered insubordinate if he failed to comply. As a result of his actions, plaintiff was placed on administrative leave for the remainder of the day. Following plaintiff's conduct at the meeting, on March 22, 1991, Saunders consulted the Area Personnel Office for BIA about removing plaintiff as soil conservationist based on the continuous problems with his performance in that position. After a discussion with the personnel office, Saunders decided to propose a suspension of plaintiff instead of removal. The proposed removal was not made known to plaintiff.

A few days later, Shadwick, with Saunders' concurrence, had to instruct plaintiff to comply with regulations limiting lease terms on land that was in an estate to no more than two years, even though plaintiff disagreed with the regulations. Just days prior to the proposed suspension of plaintiff, in early April of 1991, Saunders determined that plaintiff had inappropriately discussed with the Jackson County Sheriff the status of a certain leased tract on which plaintiff believed marijuana was being cultivated. Plaintiff interfered in a realty matter even after being instructed to stay out of realty and concentrate solely on farm plans. This breach of duty was addressed in the proposed suspension.

On April 19, 1991, Saunders personally gave plaintiff the proposed fourteen day suspension in writing. The proposed suspension provided that any actual suspension was left to the discretion of the Area Director and that plaintiff could respond to the proposal; in other words, the suspension was merely a proposal that could be challenged by plaintiff and was subject to the Area Director's final determination. Saunders asked plaintiff if he had any questions about the proposed suspension when she gave it to him. Plaintiff indicated he had no questions. Plaintiff acknowledged receipt of the suspension and never availed himself of the opportunity to respond to the proposal. Nor did he challenge the proposal or seek a final

determination by the Area Director.

Saunders intended for the proposed suspension to correct plaintiff's conduct and performance, not to cause plaintiff to resign. After being presented with the proposed suspension, plaintiff immediately submitted written notice that he was resigning "as a result of [her] continued misrepresentation of the truth regarding [his] work and [his] intentions in [his] work." Plaintiff made no reference to sex discrimination as a basis for his resignation. On April 19 and 22, 1991, the Administrative Officer at Horton, Galen Hubbard, met with plaintiff and encouraged plaintiff not to resign. Hubbard also suggested several alternatives to resignation so that plaintiff could continue his employment with the government, but plaintiff refused. While resigning, plaintiff never indicated that he was resigning because he believed he had been singled out. Instead, plaintiff said he was resigning because "sometimes a man's gotta do what he's gotta do." After plaintiff resigned, Saunders was willing to allow plaintiff to return as the Soil Conservationist in Horton, but plaintiff placed unacceptable conditions on his return.

Prior to receiving the proposed suspension, plaintiff visited the personnel office and told the Anadarko Area Personnel Officer, Evaline Gomez, that he was going to resign because he was "very unhappy. He did not like the Superintendent, he could not work with her, and she was just too pushy." Gomez asked that plaintiff not resign, but he resigned anyway.

As Superintendent, Saunders was a demanding supervisor with all employees. Saunders also had to deal with work related problems with female employees. She gave a minimally successful performance evaluation to one female employee and counseled another female employee about deficiencies in her performance. Unlike plaintiff, the other employees corrected the deficiencies addressed by Saunders. Saunders hired both male and female employees

whileat the Horton Agency.

After resigning, plaintiff filed an EEO complaint of sex discrimination, which became BIA Complaint No. 91-031, on June 26, 1991. On July 23, 1991, plaintiff's complaint of discrimination was accepted for processing with the following allegation:

> You alleged discrimination based on sex (Male) when your employment conditions were made such that you were compelled to resign on April 19, 1991 (for example: Memorandum of Admonishment dated August 17,1990; January 7, 1991, performance appraisal review; March 22, 1991, incident; and the Memorandums of Proposed 14 day Suspension dated April 19, 1991). (Constructive Discharge).

Complaint of Discrimination BIA 94-052

On January 14, 1994, plaintiff went to the Horton Agency and met with Linda Saunders, who was still the Superintendent there. Plaintiff brought a copy of a letter he received on December 16, 1993 from OPM. The letter stated as follows:

> You have not previously, nor are you currently, debarred from employment.
>
> ...
>
> Your application has been returned to OPM's Wichita Service Center where it will be available for referral to interested agencies as vacancies occur. Agencies have the responsibility to select the most highly qualified candidates from the applicants referred to them. Agencies are also responsible for adjudicating the suitability of applicants and eligibles for, and appointees to, Low Risk and Non-Sensitive positions, Public Trust Risk positions, and National Security positions within the agency. Your eligibility will provide you with full consideration for all positions for which you

> qualify. However, it does not represent a guarantee of an appointment.

Plaintiff believed this letter guaranteed him the position of Soil Conservationist at the Horton Agency. Plaintiff told Saunders that he wanted the Soil Conservationist's job, which had already been filled when Eugene Harter was selected for the position. Saunders had not seen the letter from OPM. Plaintiff showed Saunders the letter, and she read it while plaintiff was in her office. Saunders interpreted the letter differently than plaintiff; she understood the letter to mean that the agency decided if a person was suitable for employment with that agency. In addition, Saunders interpreted the letter to mean that if plaintiff applied for vacancies and was determined to be qualified, his name would be placed on a Certificate of Eligibles.

After reading the letter, Saunders explained to plaintiff that there were no vacancies at the Horton Agency. Plaintiff became argumentative and loud during the meeting, so argumentative in fact that Saunders felt threatened by his behavior. Saunders felt threatened and perceived her conversation with plaintiff as unproductive so she asked plaintiff to leave her office, not the building. She did not ask plaintiff to leave for any other reason such as prior EEO activity.

On March 1, 1994, plaintiff filed an EEO complaint of discrimination against BIA arising out of the incident with Saunders. On June 10, 1994, BIA accepted plaintiff's complaint of discrimination for processing of the following:

> ...Your complaint was filed against the Bureau of Indian Affairs...based on reprisal...
>
> On or about December 16, 1993, you received OPM's decision which stated that you met the suitability standards for Federal employment. On January 14, 1994, you went to see the Horton Agency Superintendent regarding the OPM

determination and the Soil Conservationist position, but she informed you that the Bureau of Indian Affairs had determined that you were not suitable for employment and when you asked her who in the BIA made that decision, she stated that she made that decision and ordered your removal from the building. Please review the accepted allegation and bases carefully. If you have any questions or concerns regarding the accepted allegation, please notify this office within 10 calendar days of receipt of this letter. If we do not hear from you, the accepted allegation will be investigated as identified.

Complaint of Discrimination 95-027

Plaintiff applied for the position of Soil Conservationist in Horton, Kansas, which became vacant when Eugene Harter resigned in March of 1994. This vacancy opened in March 14, 1994, and closed on April 4, 1994. The vacancy was advertised by the Andarko Area Personnel Office, not through OPM. When plaintiff filed for this vacancy, Evaline Gomez was the Anadarko Area Personnel Officer. According to plaintiff, Gomez encouraged him to file an EEO complaint when he resigned as Soil Conservationist in 1991.

In her capacity as the Anadarko Area Personnel Officer, Gomez had been delegated the authority to adjudicate suitability issues when an applicant applied directly to the agency. Gomez made a suitability determination based on the OPM Suitability Determination letter dated December 16, 1993, Quad Standard X118, FPM 338 and FPM 731-3, which authorized the agency to perform suitability determinations at the local agency level. Suitability is a term used to mean a requirement or requirements for employment by the federal government having reference to character, reputation, trustworthiness, and fitness of the

person under consideration as it relates to the efficiency of the service. A person's misconduct or negligence in employment is a consideration in determining suitability.

Gomez determined that plaintiff was not suitable for the position of Soil Conservationist at the Horton Agency, and accordingly, she did not certify plaintiff to the selecting official for the most recent vacancy, which arose when Harter resigned. Gomez determined that plaintiff met the experience and education requirements for Soil Conservationist, but plaintiff did not meet the qualification requirements set forth in the Quad Standard X118 because as the former Soil Conservationist in Horton, plaintiff did not fulfill his assignments, did not comply with the missions of the agency, was not cooperative, and was disruptive and defiant. In making this determination, Gomez considered plaintiff's conduct in his prior employment as Soil Conservationist at the Horton Agency.

In 1994, Jeannie Cooper was an Employee Relations Specialist with the Anadarko Area Personnel Office, and she was supervised by Gomez. After plaintiff applied and during the time that Gomez determined he was unsuitable for the position, Gomez consulted Cooper and expressed concerns about placing plaintiff in the same position from which he had resigned because she believed it would have an adverse impact on the Horton Agency and the efficiency of services there based on plaintiff's prior performance problems, insubordination, and defiance toward the Superintendent. Cooper agreed with Gomez that plaintiff was not suitable for the Soil Conservationist position at the Horton Agency and testified that based upon plaintiff's prior conduct, it was not a difficult decision to find plaintiff unsuitable for the position.

The Anadarko Area Personnel Office did refer plaintiff as qualified and eligible for other position vacancies, including some at the Horton Agency.

On August 11, 1993, the Anadarko Area Office referred plaintiff as an eligible applicant for the position of Rights Protection Specialist. The Anadarko Area Office also referred plaintiff as an eligible applicant for the Realty Specialist in the Horton Agency in 1993, and later in 1998, while Gomez was still the Personnel Officer, plaintiff was referred for the Superintendent's position at the Horton Agency.

Waldo Leander, a nonIndian, whose date of birth was August 9, 1958, was ultimately selected as the new Soil Conservationist.

On April 11, 1995, plaintiff filed an EEO complaint of discrimination based on race, age and reprisal, which became BIA Complaint 95-027. On July 7, 1995, plaintiff's complaint of discrimination was accepted with the following allegation:

> You applied, were rated qualified (you allege you were the only qualified Indian Preference applicant), but not certified to the selecting official for the position of Soil Conservationist, GS-457-11, located at the Horton Agency, Horton Kansas . .
> . . You allege discrimination when Anadarko Area's Office of Personnel Management did not certify you to the selecting official for consideration . . . even though in a letter dated December 16, 1993, OPM-Boyers, Pennsylvania, issued a decision that determined you to be suitable for Federal Employment and that your elibibility would provide you with full consideration for all position for which you qualify.

Complaint of Discrimination 99-045

In 1998 and 1999, Claudia Wheeler was a Personnel Staffing Specialist with BIA in Anadarko, Oklahoma. Her job duties included recruiting and advertising vacancies, rating applicants, and issuing certificates of lists of eligible qualified applicants. Wheeler's office was responsible for

advertising the vacancy for the Superintendent at the Horton Agency. Evaline Gomez was the Chief Personnel Officer at the time. Wheeler did not know plaintiff when the Superintendent's position was being advertised.

The position of Superintendent at the Horton agency was advertised three different times: from August 3, 1998 to September 2, 1998; from October 20, 1998 to November 19, 1998; and from November 30, 1998 to December 29, 1998. Plaintiff applied for the position the first time it was advertised. At that time, it was advertised as a GS-13 position. There were a total of eight applicants, including plaintiff. Of those eight, five, including plaintiff, were determined to meet the basic qualification requirements of the position. Those five candidates were referred to the selecting official without ranking them because there were five or fewer qualified candidates. The selecting official returned the certificate of eligible applicants without making a selection and requested that the position be readvertised.

Dan Deerinwater, the selecting official, was the Anadarko Area Director with supervisory responsibility over the Horton Agency when the Superintendent's vacancy was advertised in 1998. After the position was first advertised he received the certificate of eligible applicants with only five qualified applicants listed. Among those was plaintiff, Richard Beams. Deerinwater decided not to select any of the five candidates because he believed the applicant pool was too small and the vacancy announcement had not reached a large enough group of people who might be interested in the position. He also did not consider any of the five applicants to be superiorly qualified for the job. Deerinwater viewed plaintiff's experience as being primarily related to land operations, soil conservation, and realty. He viewed plaintiff as lacking experience in tribal operations, roads maintenance and construction, and in trust responsibility.

Deerinwater requested that the position be readvertised, which occurred from October 20, 1998, to November 19, 1998, but no new applicants applied. The original five qualified applicants, including plaintiff, were carried forward for consideration as eligible applicants. When no new applicants applied in response to the second announcement, Deerinwater requested that the position be readvertised as a GS-12/13 with the goal of obtaining a broader pool of applicants from which to select. Deerinwater understood that the original five qualified candidates would be carried forward for consideration. At the time, Deerinwater knew of plaintiff and that plaintiff had problems in the past with the Horton Agency Superintendent. Deerinwater did not know that plaintiff had filed EEOC complaints until some time after the Superintendent's vacancy was filled.

The third advertisement of the Superintendent vacancy resulted in twenty-four applications, comprised of sixteen new applications and the eight applications received in response to the first advertisement. Of the twenty-four applicants, fifteen were determined to be qualified; these fifteen included the original five qualified applicants, whose applications had been carried forward. Plaintiff was included among the fifteen qualified applicants.

BIA regulations, specifically 44 Bureau of Indian Affairs Manual 335, (BIAM) subsection 1.17A, required the formation of a promotion panel because of the large number of qualified applicants and the grade level of the position. In forming the promotion panel, Wheeler served in an advisory capacity. Three panel members, all of whom held a position at the same or higher grade level of GS-12/13, were selected. The three panel members were Betty Tippeconnie, who was the Superintendent at the Anadarko Agency, Bruce Maytubby, who was a regional realty officer, and Galila Johnson, who was the Superintendent of the Concho

Agency. The panel was convened in Anadarko on January 25, 1999.

Each member of the ranking panel was given fifteen applicant packages and a ranking sheet to rank each of the applicants in the areas of knowledge, skill and abilities with a score of 5 for being superiorly qualified and a score of 1 for being acceptably qualified based upon the information contained in each applicant's application. The panel members worked independently of each other in ranking the applicants.

Panel member Galila Johnson rated plaintiff as a 1 for knowledge of government programs, a 3 in managerial leadership ability and program management, a 3 in relationships within the BIA and the Indian Community, and a 1 on ability to communicate. Johnson knew plaintiff at the time, but she did not know that he had made EEO complaints. Panel member Betty Tippeconnie rated plaintiff with a 1 in all four of the categories based upon the information in plaintiff's application, the crediting plan, and the position description. Tippeconnie believed plaintiff had only an acceptable level of knowledge, skills and abilities. Tippeconnie did not know plaintiff nor that he had ever participated in any EEOC activity. Panel member Bruce Maytubby rated plaintiff as a 3 in two of the categories, a 1 in one of the categories, and a 2 in the other category. Maytubby knew plaintiff and knew he had some EEO activity, but he did not have any specific knowledge of plaintiff's complaints. The knowledge he had did not impact his ranking of plaintiff's application.

Claudia Wheeler totaled the scores given by the members of the ranking panel to each of the fifteen qualified applicants, which were recorded on the Summary of Panel Member Evaluation for Merit Promotion. Based on Wheeler's totaling of panel member scores, Johnson awarded plaintiff a total score of 8, Tippeconnie awarded plaintiff a total score of 4, and Maytubby, the only one with

knowledge of plaintiff's EEO activity, awarded plaintiff the highest total score of 9. The scores were added together by Wheeler and divided by three (the number of panel members) giving plaintiff a total average score of 7. Wheeler totaled and averaged the scores for each of the fifteen qualified applicants. Pursuant to 44 BIAM 335, Wheeler determined that a score of 12 was the cutoff point, meaning that only applicants with an average score of 12 or higher would be referred to the selecting official. With an average score of only 7, plaintiff was not referred to the selecting official. Five of the fifteen applicants scored at 12 or above, and they were referred on a certificate of eligibles to the selecting official. Galen Hubbard was selected from these final five applicants. Hubbard was the Administrative Officer at the Horton Agency, and Deerinwater selected Hubbard as the Superintendent based upon his knowledge, skills and abilities, his current location at the Horton Agency, and his existing relationship with other employees at the Horton Agency.

On June 14, 1999, plaintiff filed an EEOC complaint, which became BIA Complaint 99-045. On December 27, 2000, BIA accepted plaintiff's complaint of discrimination for processing of the following:

> You applied for Anadarko Area Vacancy Announcement Number AN-98-52, for the position of Superintendent, GS-340-13 . . . which Opened: 8-03-98 and Closed09-02-98. The position was readvertised under the same Anadarko VacancyNumber AN-98-52 . . . that Opened 10-20-98 and Closed 11-19-98. The position was against readvertised under the same Anadarko Vacancy Announcement Number AN-98-52, but advertised as Superintendent, GS-340-12/13, that Opened 11-30-98 and Closed 12-29-98. In a letter dated April 15, 1999, the AnadarkoArea Personnel Office informed you that you were rated qualified but not

rated among the Best Qualified Group that was referred/certified to the selecting official.

III. Discussion

Title VII makes it an unlawful practice for an employer "to fail to hire . . . any individual .. . because of such individual's . . . sex,"[33] and to discriminate against a job applicant because he has opposed an unlawful employment practice or "made a charge, testified, assisted or participated in any manner" in Title VII proceedings.[34] Title VII applies to federal employees.[35] The ADEA sets forth an analogous prohibition against discrimination based upon age in federal employee personnel actions.[36]

Absent direct evidence of discrimination, courts apply the legal standards announced in *McDonnell Douglas Corp v. Green*,[37] to Title VII and ADEA claims.[38] *McDonnell Douglas* and its progeny establish "an allocation of the burden of production and order for the presentation of proof . . . in discriminatory-treatment cases."[39] "First, the plaintiff must establish a prima facie case of discrimination."[40] If the plaintiff makes out a prima facie case, the burden shifts to the defendant to "produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason."[41] In the Tenth Circuit, the burden of proving anondiscriminatory reason has been characterized as "exceedingly light."[42] If the defendant produces evidence showing a legitimate, nondiscriminatory reason for its

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33 42 U.S.C. § 2000e-2(a)(1).

34 42 U.S.C. § 2000e-3(a).

35 *See* 42 U.S.C. § 2000e-16(a).

36 See 29 U .S.C. §633a; *Villescas v. Abraham*, 311 F.3d 1253, 1257 (10th Cir. 2002).

37 411 U.S. 792 (1973).

38 *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *Sanchez v. Denver Pub. Schools*, 164 F.3d 527 (10th Cir. 2002) (ADEA and Title VII claims).

39 *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

alleged actions, "the *McDonnell Douglas* framework - with its presumptions and burdens - disappear[s] . . . and the sole remaining issue [is] discrimination vel non . . . ."[43] In order to prevail at this stage, the plaintiff must demonstrate that the defendant's proffered explanation is not its true reason, but instead is a pretext for discrimination.[44] Although the intermediate evidentiary burdens shift back and forth under this framework, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[45]

BIA Complaint 91-031

In this claim, plaintiff contends that his resignation as Soil Conservationist constituted reverse sex discrimination and constructive discharge in violation of Title VII. When bringing a claim for reverse gender discrimination, the *Mc-Donnell Douglas* burden-shifting framework ismodified because males belong not to a historically disfavored group, but rather, to a historically favored group.[46] Thus, when a member of a favored group alleges disparate treatment, "themodified because males belong not to a historically disfavored group, but rather, to a historically favored group.[46] Thus, when a member of a favored group alleges disparate treatment, "thecourts have adjusted the prima facie case to reflect this specific context by requiring a showing of background circumstances which support the suspicion that the defendant is that unusualemployer who discriminates

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40*Reeves*, 530 U.S. at 142. 41*Id.*

42*Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275, 1279 (10th Cir.), *cert. denied*, 528 U.S. 814 (1999). 43*Reeves*, 530 U.S. at 142-43.

44*Texas v. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981), *Rivera v. City & County of Denver*, 365 F.3d 912, 920 (10th Cir. 2004).

45*Reeves*, 530 U.S. at 143.

46*See Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252-53 (10th Cir. 1986).

against the majority."[47] A plaintiff can also state a prima facie case of reverse discrimination by presenting "direct evidence of discrimination, or indirect evidence sufficient to support a reasonable probability, that but for the plaintiff's status the challenged employment decision would have favored the plaintiff."[48]

Plaintiff has provided no direct evidence of discrimination, nor has he provided any indirect evidence sufficient to support a reasonable probability that he suffered a constructive discharge because of his sex. The incidents to which plaintiff refers to support his sex discrimination claim demonstrate at best a personality conflict between plaintiff and Saunders. Plaintiff essentially claims that Saunders and the Reality Department personnel were incompetent and that he could have better served the Horton Agency. This incompetence, plaintiff asserts, resulted in an increased workload for him, which even a diligent employee would have been unable to handle, and thus, he was unjustly terminated. When plaintiff was presented with the proposed suspension by Saunders, he immediately submitted written notice that he was resigning "as a result of [her] continued misrepresentation of the truth regarding [his] work and [his]intentions in [his] work." Plaintiff made no reference to sex discrimination as a basis for his resignation. Plaintiff forgets that his claim is for gender discrimination, not wrongful termination without just cause. In fact, plaintiff claims that after he resigned "Ms. Saunders harassed some female employees to the point that plaintiff was told that Antionette Houle, Reality Specialist, was considering quitting also." Plaintiff may have demonstrated that Saunders was a difficultsupervisor who engendered conflict, but he has not provided even

47*Sanchez v. Phillip Morris Inc.*, 992 F.2d 244, 248 (10th Cir. 1992).

48*Notari v. Denver Water Dept.*, 971 F.2d 585, 590 (10th Cir. 1992); *see also Mattioda v. White*, 323 F.3d 1288, 1293 (10th Cir. 2003) (noting that "Notari continues to operate as Tenth Circuit precedent").

a hint of evidence that this conflict occurred because of his sex.

Plaintiff also produced no background circumstances which support the suspicion that the defendant is that unusual employer who discriminates against the majority. To the contrary, plaintiff's averments support the conclusion that even if Saunders actions could somehow be construed to constitute discrimination, she discriminated equally against both male and female employees. It is uncontroverted that Saunders was a demanding supervisor with all employees, and that she had to deal with work related problems with female employees as well as plaintiff. She gave a minimally successful performance evaluation to one female employee and counseled another female employee about deficiencies in her performance. Unlike plaintiff, the female employees did not feel compelled to resign because of Saunders' corrective action, but instead corrected the deficiencies addressed by Saunders. Plaintiff has not shown that Saunders was the unusual employer who discriminates against the majority and consequently, has not established a prima facie case of discrimination.

Even, assuming, *arguendo*, that plaintiff had established a prima facie case of reverse gender discrimination, summary judgment would still be appropriate because defendant has articulated legitimate nondiscriminatory reasons for its actions. The uncontroverted facts establish that even prior to Saunders' tenure as Supervisor, Brian Pogue encountered problems with plaintiff's work in the Horton agency and determined that plaintiff's record keeping system was deficient and that plaintiff interfered with Pogue's appraisal duties. Moreover, plaintiff failed to perform his job duties over at least a six-month period during Saunders' tenure; he was counseled about his deficiencies and he ignored his supervisors' orders. Six months before theproposed

suspension, plaintiff was instructed to prioritize his job tasks to bring his leasing activities current and to provide completed tasks to his supervisors, but plaintiff's work product continued to be inadequate. Plaintiff was told to stop involving himself in matters other than the completion of farm plans; instead he attended a lease sale and visited the Jackson County Road Supervisor, Ronald Karn, to discuss a road right-of-way closure in direct contravention of his supervisor's orders. While visiting with Karn, plaintiff gave Karn the impression that plaintiff had the authority to make demands related to road right-of-ways. This caused Karn to call Saunders with his concerns and Saunders confirmed that plaintiff neither had the authority, nor the responsibility to make road right-of-way decisions.

Plaintiff's insubordinate conduct continued even after he was counseled about this actions. On March 22, 1991, Shadwick met with plaintiff to discuss his failure to finish the farm plans and his conversation with Karn concerning the road right-of-way. During the meeting, plaintiff became defensive, walked out, and had to be placed on administrative leave for the remainder of the day as a result of his conduct. Additionally, in early April of 1991, Saunders determined that plaintiff had inappropriately discussed with the Jackson County Sheriff plaintiff's belief that marijuana was being grown on a certain leased tract. Plaintiff's actions culminated in a April 19, 1991, meeting in which Saunders gave plaintiff a proposed fourteen day suspension. In response, plaintiff immediately resigned.

The Court concludes that defendant had legitimate nondiscriminatory reasons forpresenting plaintiff with the notice of suspension. Plaintiff had demonstrated a pattern of insubordinate conduct, and deficient work product. Both are legitimate nondiscriminatory reasons to fire an employee.[49] Plaintiff has produced no evidence that defendant's proffered presenting plaintiff with the notice of

suspension. Plaintiff had demonstrated a pattern ofinsubordinate conduct, and deficient work product. Both are legitimate nondiscriminatory reasons to fire an employee.[49] Plaintiff has produced no evidence that defendant's proffered reason for his suspension was not the true reason for its actions, other than his own conclusory reason for his suspension was not the true reason for its actions, other than his own conclusory views about his performance at the Horton agency. Plaintiff has not produced any evidence that the alleged deficiencies in his work product that were documented over at least a six month period were merely imagined by defendant. As such, plaintiff has also failed to show that defendant's explanation for his suspension was a pretext for discrimination.

To the extent plaintiff alleges a constructive discharge because of his sex, his claim similarly fails. Constructive discharge occurs "when the employer, by its illegal discriminatory acts, has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign."[50] A plaintiff's suggestive views are irrelevant as a plaintiff must objectively demonstrate that he had "no other choice but to quit."[51]

As previously discussed, there is no evidence that plaintiff was given the proposed suspension because of his male gender. Indeed, even before receiving the proposed suspension, plaintiff told the Andarko Area Personnel Officer that he was going to resign because he was very unhappy, he did not like Saunders and could not work with

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[49]*E.g., Birdwhistle v. Kansas Power & Light Co.*, 723 F. Supp. 570, 574 (D. Kan. 1989) (insubordination);
McCue v. State of Kansas, Dep't of Human Res., 938 F. Supp. 718, 724 (D. Kan. 1996) (poor work performance).

[50]*Sanchez v. Denver Public Schools*, 164 F.3d 527, 534 (10th Cir. 1998).

[51]*Id.*

her because "she was just too pushy." After being presented with the proposed suspension, he said that he was resigning because "sometimes a man's gotta do what he's gotta do," not because he had been unfairly treated because of his gender.

More importantly, plaintiff has not demonstrated that he was left with no other choice but to resign. Plaintiff voluntary resigned when presented with the proposed fourteen day suspension. This was merely a proposed suspension to which plaintiff was allowed an opportunity to respond before the suspension took effect. Plaintiff never responded to the proposal, nor discussed the proposed suspension with the Area Director, who made the final suspension determination, before resigning. On April 19, and 22, 1991, Galen Hubbard met with plaintiff and encouraged him not to resign. Hubbard suggested several alternatives to resignation so that plaintiff could continue his employment with the government. Plaintiff rejected these suggestions. Thus, not only has plaintiff not demonstrated that he was discharged because of his sex, but he has not shown that he had no other choice but to quit. His constructive discharge claim fails as a matter of law.

BIA Complaint 94-052

In BIA Complaint 94-052, plaintiff claims his confrontation with Saunders in January 1994 regarding the OPM letter constituted retaliation in violation of Title VII. The OPM letter indicated that plaintiff had never been disbarred from federal employment and that his application would be referred to agencies as vacancies arose. Yet, plaintiff construed this letter as guaranteeing him the position of Soil Conservationist at the Horton agency, a position that had already been filled by Eugene Harter, and demanded to be re-employed in his former position. Saunders disagreed and refused to rehire plaintiff. These allegations alone form the basis of BIAComplaint 94-052.[52]

52Plaintiff attempts to relate this claim to the original decision to remove his

A prima facie showing of retaliation requires proof that: "(1) the plaintiff engaged inprotected opposition or participated in a Title VII proceeding; (2) the employer acted adversely subsequent to or contemporaneous with employee activity; and (3) there is causal connection between plaintiff's activity and the employer's action."[53] There is no dispute that filing plaintiff'sprior EEO complaint constitute protected activity.

The second prong of a prima facie case requires proof of an adverse employment action. An adverse employment action constitutes "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[54] In a claim for failure to hire, *McDonnell Douglas* "demand[s] that the alleged discriminatee demonstrate at least that his rejection did not result from the absence of a vacancy in the job sought."[55] Consequently, "there can be no finding of an adverse employment action if there was no vacancy at the time plaintiff applied or theposition was never filled."[56] Here, it is uncontroverted that the position of Soil Conservationist was not vacant when plaintiff demanded that he be rehired in that capacity. Eugene Harter was serving as Soil Conservationist at the Horton agency at that time. Consequently, plaintiff has

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name from the list of eligible
applicants for the Soil Conservationist vacancy that was created b y plaintiff's 1991 resignation, and that was filled in
1992 by Harter. This claim, however, has already been litigated in *Beams* v *Norton*, 256 F. Supp. 2d 1203, 1215-16
(D. K an. 2003) and plaintiff is estopped from relitigating this matter. *See Augustine v. Adams*, 88 F. Supp. 2d 1166,
1170 (D. Kan. 2000) (discussing issue and claim preclusion).

53*Mattioda v. White*, 323 F.3d 1288, 1293 (10th Cir. 2003).

54*Annett v. Univ. of Kansas*, 371 F.3d 1233, 1237 (10th Cir. 2004).

55*Int'l Bhd. of Team sters v. United States*, 431 U.S. 324, 358 n.44 (1977).

56*Morgan v. Fed. Home Loan Mortgage Corp.*, 172 F. Supp. 2d 98, 112-13 (D.D.C. 2001).

failed to demonstrate an adverse employment action"causal connection by proffering Plaintiff also fails to satisfy the third prong of his prima facie case of retaliation. He fails to demonstrate a causal connection between his filing of EEO complaints and Saunders' refusal to rehire him. "The causal-connection element of a prima facie retaliation claim requires the employee to show that the employer's motive for taking adverse action was its desire to retaliate for the protected activity."[57] A plaintiff may also establish a evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action."[58] Plaintiff has not shown that Saunders refused to rehire him because of his prior EEO activity; nor does a temporal proximity exist to create an inference of retaliatory motive. It had been approximately three years since plaintiff filed his EEO complaint alleging that he was unlawfully terminated in violation of Title VII. Even a three-month time period, standing alone, is insufficient to establish causation.[59] Clearly a three year time period is much too long to establish a causal connection.

Even if plaintiff had established a prima facie case of retaliation, defendant has articulated legitimate, non-discriminatory reasons for its failure to rehire plaintiff. First, the position sought by plaintiff was not vacant, but rather was already filled by Eugene Harter.
Additionally, plaintiff had already proven his inability to fulfill the responsibility of the Soil Conservationist along with his inability to follow directionfrom the position's supervisor. When plaintiff was the Soil Conservationist, he demonstrated his incompetence and was routinely

57*Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205, 1218 (10th Cir. 2003).
58*Annett v. Univ. of Kansas*, 371 F.3d at 1239-40.
59*Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999).

insubordinate. The Court concludes that defendant its decision was not motivated by discriminatory intent. Plaintiff offers no evidence to suggest these reasons are merely pretextual. Consequently, summary judgment is proper on plaintiff's retaliation claim relating to BIA Complaint 94-052.

BIA Complaint 95-027

In BIA Complaint 95-027, plaintiff claims that he was discriminated against on the basis of age, race and reprisal when he was not certified as a qualified applicant for the Soil Conservationist position in the Spring of 1994. The Court addresses each of plaintiff's claims in turn.

Race and Age Discrimination

To prove a prima facie case for discriminatory failure to hire, plaintiff must prove that: (1) he belongs to a protected class; (2) he applied for and was qualified for a job for which the employer was seeking applicants; (3) despite being qualified, he was rejected; and (4) after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.[60] For a race discrimination claim, a plaintiff need not establish that defendant hired someone outside the protected class to make out a prima facie case of race discrimination.[61] However, an age discrimination claim under the ADEA requires proof that the person hired was younger than the plaintiff.[62] The prima facie case for both race and age claims requires a plaintiff to eliminate the most common nondiscriminatory reasons for not hiring an applicant, including lack of qualifications and absence of a vacancy.[63] It is not disputed that plaintiff

60Garcia v. Pueblo Country Club, 299 F.3d 1233, 1238 (10th Cir. 2002) (quoting Kindrick v. Penske Transp. Servs. Inc.., 220 F.3rd 10th Cir. 2000)).
61*Kendrick*, 220 F. 3d at 1226.
62*Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1004 (10th Cir.), *cert denied*, 517 U.S. 1245, 116 S. Ct. 2500
(1996); *Beams v. Norton*, 256 F. Supp. 2d 1203, 1214 (D. Kan. 2003).
63*Kendrick*, 220 F.3d at 1226-27.

belonged to a protected class, applied for the position of Soil Conservationist and that someone outside the protected class was hired in the position. Defendant hired Waldo Leander, a non-Indian who was younger than plaintiff, to fill the Soil Conservationist vacancy. Nevertheless, defendant argues that plaintiff fails to satisfy his prima facie case because he cannot prove that he was a qualified applicant for the Soil Conservationist position. In support of this argument, defendant relies upon plaintiff's inability to fulfill the responsibilities of the job in his previous stint as Soil Conservationist. Plaintiff was, however, technically qualified for the position; he met the experience and educational requirements for the Soil Conservationist vacancy. Gomez simply determined that although plaintiff was technically qualified for the position, he was not a suitable candidate for Soil Conservationist because of his prior conduct in the position. The Court, bearing in mind that the burden imposed on a plaintiff at the prima facie stage is not onerous,[64] concludes that plaintiff has stated a prima facie case of race and age discrimination.

Despite plaintiff proving a prima face case of discrimination, his claims still fail because defendant has articulated legitimate, nondiscriminatory reasons for its actions, and plaintiff has failed to show that these reasons were pretextual. As previously discussed in connection with BIA Complain 91-031,[65] plaintiff had already demonstrated incompetence in the position of SoilConservationist. He did not complete assignments on time and interfered in matters outside hisjob responsibilities. In addition, he was insubordinate and repeatedly denied his supervisors' requests. Poor work habits and insubordination both constitute legitimate nondiscriminatory reasons for defendant's decision not to

64*Tungol v. Certainteed Corp.*, 202 F. Supp. 2d 1189, 1197 (D. Kan. 2002).
65*See infra* p. 25-27.

rate plaintiff as suitable for the Soil Conservationist position.[66] Plaintiff has not suggested that defendant's proffered reasons for its actions were merely a pretext and not the true reasons for its actions. As such, defendant's motion for summary judgment on plaintiff's age and race discrimination claims related to BIA Complaint 95-027 must be granted.

Retaliation

Plaintiff claims that he was not rated as suitable for the position of Soil Conservationist because of his prior EEO complaints. To establish a prima facie case of retaliation, plaintiff must show that he engaged in protected activity, suffered an adverse employment action, and that there was a causal connection between the two. It is uncontested that plaintiff's prior EEO filings constitute protected activity and that defendant's failure to hire plaintiff as the Soil Conservationist at the Horton Agency resulted in an adverse employment action. To prove his prima facie case, plaintiff must also show that there was a causal connection between his prior EEO complaints and defendant's decision to rate him unsuitable for the Soil Conservationist vacancy. Plaintiff must prove either that the employer's motive for taking the adverse action was its retaliatory desire, or that circumstances exist, such as temporal proximity, which justify an inference of retaliatory motive.[67] Planitff has not shown that Gomez sought to retaliate against him because of his prior EEO activity. Indeed, plaintiff credits Gomez with encouraging him to

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66See *e.g., Birdwhistle v. Kansas Power & Light Co.*, 723 F. Supp. 570, 574 (D. Kan. 1989)
(insubordination); *McCue v. State of Kansas, Dep't of Human Res.*, 938 F. Supp. 718, 724 (D. Kan. 1996) (poor
work performance).

67*See Wells v. Colorado Dep't of Transp.*, 325 F.3d 1205, 1218 (10th Cir. 2003); *Annett v. Univ. of Kansas*,
371 F.3d at 1239-40.

file an EE omplaint when he resigned from the Horton agency in 1991. Moreover, the Anadarko Area Personnel Office referred plaintiff as qualified for other vacancies, including openings at the Horton Agency. For instance, while Gomez was still the personnel officer, plaintiff was referred for the Superintendent's position at Horton.

Nor has plaintiff established a temporal proximity sufficient to create an inference of retaliation. To the Court's knowledge, plaintiff's most recent prior EEO complaint was filed on March 1, 1994. The EEO complaint at issue in this retaliation claim was not filed until April 11, 1995. A thirteen month gap between an EEO filing and an adverse employment action is insufficient, in itself, to establish a causal connection.[68] Thus, the Court concludes that plaintiff has failed to prove a prima facie case of retaliation.

Even supposing plaintiff had established a prima facie case of retaliation, his claim would still fail because defendant's professed reasons for its actions, plaintiff's incompetence and insubordination, are, as repeatedly discussed by the Court, legitimate nondiscriminatory reasons for defendant's actions. Plaintiff has not suggested that defendant's decision not to rate him as suitable was motivated by anything other than his past incompetence in the identical position for which he sought employment, and his past insubordinate attitude toward the individual who would supervise him if he were deemed suitable and ultimately hired as the Soil Conservationist. As such, plaintiff has failed to show that the reasons advanced by defendant for not certifying Plaintiff's retaliation claim fails as a him as suitable were a pretext for unlawful discrimination.Plaintiff's retaliation claim fails as a matter of law.

68*See Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999) (Even a three-month time
period, standing alone, is insufficient to establish causation).

BIA Complaint 99-045

In his final BIA Complaint, plaintiff claims that defendant's failure to select him as Superintendent for the Horton agency in 1999 was in retaliation for his prior EEO filings. This claim too fails as plaintiff has not established a prima facie case of retaliation nor shown that defendant's professed reason for its actions was in reality a pretext for unlawful discrimination.

To establish a prima facie case of retaliation, plaintiff must show that he engaged in protected activity, suffered an adverse employment action, and that there was a causal connection between the two. There is no question that plaintiff had engaged in protected activity by filing EEO complaints or that defendant's refusal to hire plaintiff resulted in an adverse employment action. The downgrade of the position from a GS 13 to a GS 12 level, though, was not an adverse employment action because plaintiff's name was always included in the list of qualified applicants.

Plaintiff, however, must still show a causal connection between his previous activity and the defendant's decision not to hire him. Plaintiff has made absolutely no attempt to show the requisite causal connection. In fact, in his "Response to Defendant's Statement of Facts," plaintiff only responds to one of the thirty-one uncontested facts related to this claim and this response is completely irrelevant to the causal connection showing. Moreover, only one person involved in the process for selecting the Superintendent knew that plaintiff had filed EEO complaints; a panel member who ranked plaintiff and whose rankings were responsible for paring down the number of applicants, knew that plaintiff had engaged in protected activity, but he ranked plaintiff higher than any other member of the panel. No evidence disputes his testimony that his knowledge of plaintiff's prior EEO activity did not affect his rankings of plaintiff. Nor is there

causal connection; plaintiff's most recent EEO complaint had been filed in 1995, approximately four years before the alleged adverse employment action. Plaintiff has, thus, failed to demonstrate a prima facie case of unlawful retaliation.

Even if plaintiff had established a prima facie case, his claim would still fail as defendant has articulated legitimate, nondiscriminatory reasons for failing to hire plaintiff as Superintendent, and plaintiff does not suggest that these reasons are a pretext to hide defendant's true intentions. First, the downgrading of the position from a GS level 13 to GS level 12, even if it did constitute an adverse action, was for the purpose of increasing the applicant pool for an important supervisory position above five and constitutes a legitimate nondiscriminatory reason for defendant's actions. Secondly, plaintiff did not make the final cut of applicants because he failed to score high enough in the areas of knowledge of government programs, managerial leadership ability and program management, relationships within the BIA and the Indian Community, and ability to communicate. Defendant has shown plaintiff was not selected because he was not qualified, not because he had previously filed EEO complaints. The only evidence plaintiff offers to suggest that the selection process was unfair is a favorable statement from a Supervisor in 1990, but this evidence is not relevant. The opinions of plaintiff's supervisor in 1990 have no bearing on whether the Panel members fairly evaluated plaintiff in 1999. As such, plaintiff fails to show that defendant's articulated reasons for its actions were merely pretextual and this claim fails as a matter of law.

IT IS THEREFORE ORDERED BY THE COURT that defendant's Motion for Summary Judgment is GRANTED and this case is dismissed.

IT IS SO ORDERED.

Dated this 7th day of September 2004.

S/ Julie A. Robinson
Julie A. Robinson
nited States District Judge